F- 134

[redacted], Original

IN THE

OCT 27 2005

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Motion To Reopen and for a Supplemental Decree

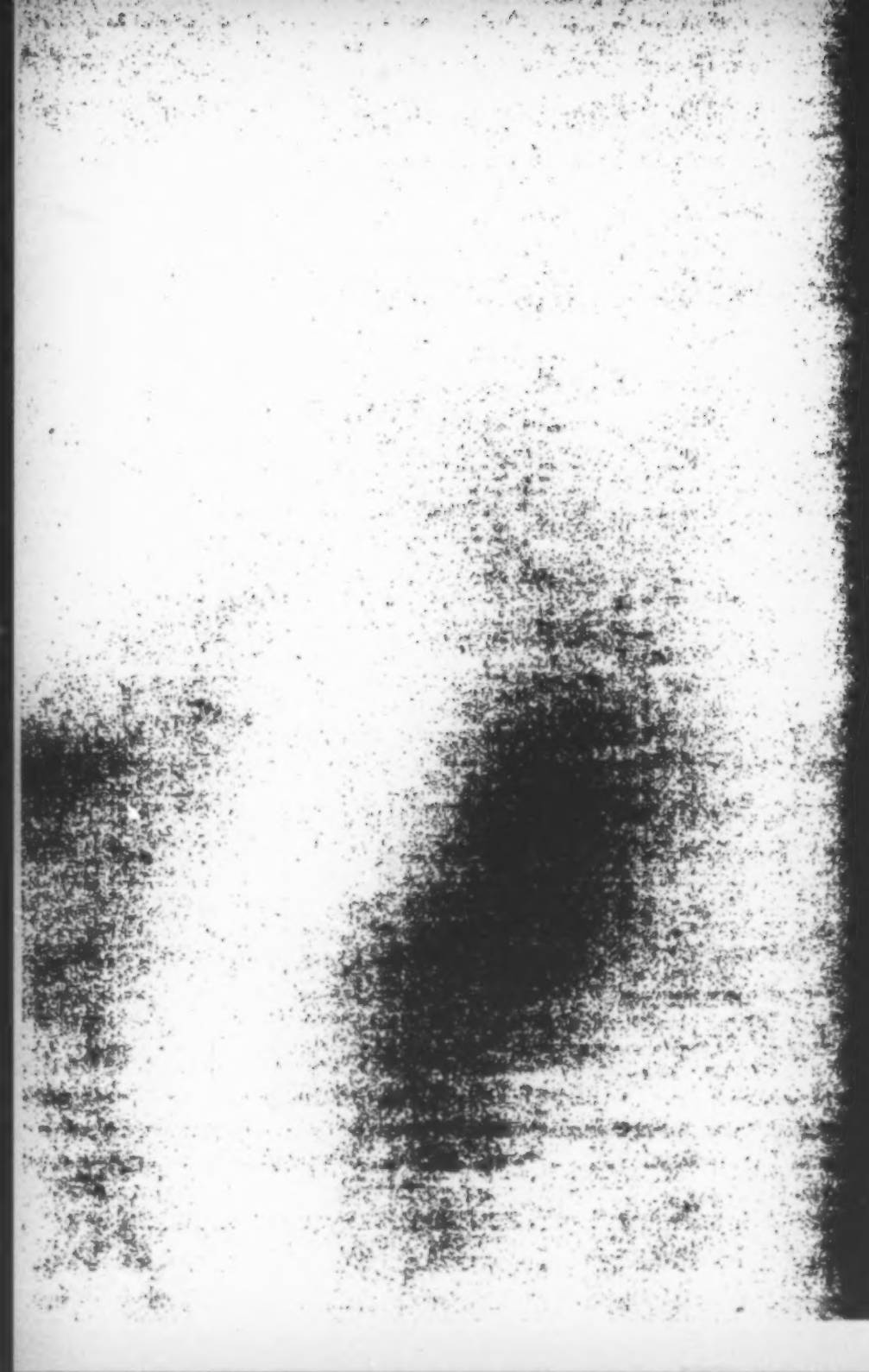
BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE STATE OF NEW JERSEY'S MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether New Jersey has suffered any injury by Delaware's denial of a permit to B.P. p.l.c. ("BP") sufficient to warrant the exercise of this Court's original jurisdiction, when administrative reviews of BP's Crown Landing project are still pending before New Jersey and United States administrative agencies.

2. Whether original jurisdiction exists where BP, not New Jersey, is the real party in interest, and New Jersey could obtain all the benefits of the project by permitting it to be located at another site that does not encroach on Delaware's sovereign territory.

3. Whether a 1905 Compact between Delaware and New Jersey that authorizes each State "on its own side of" the Delaware River to "continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States," gives New Jersey "exclusive" riparian jurisdiction that prohibits Delaware from applying its coastal zone management laws to deny BP's proposal to construct a massive bulk transfer facility on Delaware's subaqueous lands.

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INTRODUCTION

New Jersey brings this action so that a subsidiary of B.P. p.l.c. ("BP") can build a massive liquefied natural gas ("LNG") processing terminal on lands within Delaware's border, in a coastal area determined by Delaware's General Assembly to be among "the most critical areas for the future of the State in terms of the quality of life." Del. Code Ann. tit. 7, § 7001. The lands are submerged lands owned by Delaware in trust for the people of the State. New Jersey, however, claims that Delaware cannot discharge its responsibilities as a sovereign and trustee because under a 1905 interstate compact Delaware ceded all jurisdiction over these lands for any structure originating on the New Jersey shore. At both the procedural and substantive levels, New Jersey's action is flawed and should be rejected by this Court.

Procedurally, New Jersey improperly invokes this Court's original jurisdiction. New Jersey styles its action as a "Motion to Reopen and for a Supplemental Decree" ostensibly to modify a decree issued by this Court in 1935 that settled a longstanding boundary dispute between the two States. *See New Jersey v. Delaware*, 295 U.S. 694 (1935). This case does not concern the boundary at all, however, but rather the interpretation of a provision concerning the exercise of riparian rights in a 1905 Compact entered into between the two States. The 1935 Decree addressed only the boundary, not the exercise of riparian rights. Even if this Court were to accept New Jersey's alternative form of pleading by treating this case as a complaint proceeding, New Jersey's invocation of the Court's jurisdiction should be rejected. Neither New Jersey itself nor various agencies of the United States government have completed their administrative reviews vetting BP's proposed LNG bulk transfer facility. Given that any of those reviews could result in a rejection of BP's proposal, it is completely speculative at this time that Delaware's decision to reject the proposal is the cause of any injury that BP might suffer. The "injury" to New Jersey is also

speculative, given that alternative sites exist where the facility could be located that would not encroach on Delaware's lands and yet would produce the very same financial benefits to New Jersey and its citizens. In short, this case is being invoked by New Jersey for the commercial convenience of a large corporation that is not even a citizen of that State.

Substantively, New Jersey's action is flawed because the 1905 Compact cannot be read fairly as denying Delaware the authority to regulate the dredging and construction of a massive bulk product transfer facility within its fragile coastal zone. As the law stood prior to 1905, Delaware unquestionably could deny BP permission to build this facility. Nothing in the 1905 Compact changed that result. Rather, Article VII confirmed that each State would "continue to exercise" riparian jurisdiction "on its own side of the river." NJ App. 5a. That language provided that the status quo would remain in place and that, whenever the boundary between the two States was finally resolved, each State would "continue to exercise" jurisdiction within its own border. Nothing in the Compact confers on New Jersey the extraordinary right it seeks here — to approve unilaterally a project that would displace 800,000 cubic yards of Delaware soil on a plot 27 acres large and to bar Delaware from having any say in the matter. The fact that this land borders New Jersey does not warrant a departure from the longstanding principle that each State has sovereign control and public trust obligations over its own lands within its boundary.

JURISDICTION

This Court lacks jurisdiction over New Jersey's Motion to Reopen and for a Supplemental Decree in No. 11, Original. New Jersey does not seek to enforce any provision of this Court's 1935 Decree, which pertained exclusively to the boundary dispute between the States and did not adjudicate their respective powers to define and regulate the exercise of riparian rights. Its Motion therefore does not properly invoke this Court's retained jurisdiction

over that decree. Nor does New Jersey's Motion properly invoke this Court's original jurisdiction, if the Motion is viewed as a request for leave to file a new complaint. New Jersey has not identified any cognizable injury to itself or its citizenry caused by Delaware. Indeed, neither New Jersey nor the United States government has issued all of the permits necessary for federal and state approval of BP's proposed LNG terminal. New Jersey's allegation that Delaware's action has caused injury to New Jersey is therefore premature. Absent a definitive conclusion that the BP project will in fact be approved by the other necessary federal and New Jersey authorities, New Jersey's claim that Delaware's refusal to approve BP's Crown Landing project is causing New Jersey's injury is purely speculative. This Court also lacks jurisdiction because New Jersey is suing to further the interests of a private party — BP — that is not even a New Jersey citizen. But, even if this Court has original jurisdiction over the instant dispute, it should decline to exercise that jurisdiction, because BP, the real party in interest, had (but purposefully declined to pursue) an adequate alternative forum in which to resolve the claims New Jersey presents here and that forum could have produced an appeal ultimately to this Court upon a petition for writ of certiorari. *See infra* pp. 32-35.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by New Jersey, this case involves Article VIII of the 1905 Compact, which states:

> Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

STATEMENT OF THE CASE

A. Delaware's Sovereignty Over The Delaware River Within The Twelve-Mile Circle

Delaware traces its sovereign title to lands within the State's boundary to a 1682 grant to William Penn from the Duke of York. *See New Jersey v. Delaware*, 291 U.S. 361, 365 (1934). That grant embraced the lands within a twelve-mile circle of the New Castle, Delaware courthouse, a description that extended across the Delaware River to points at the low-water mark of the New Jersey shoreline. From the outset, Penn insisted on his ownership of the subaqueous soil of the Delaware River, while acknowledging common rights, such as to navigation on the river. For example, Penn instructed one of his commissioners involved in boundary negotiations with the Province of New Jersey as follows: "Insist upon my Title to ye River, Soyl and Islands thereof according to Grant. . . . They have ye Liberty of ye River, but not ye Propriety." *See id.* at 374.

Between the time of the Duke of York's grant to Penn and this Court's 1934 decision in *New Jersey v. Delaware*, Delaware's sovereignty over the subaqueous land within the twelve-mile circle was upheld in several lawsuits. In a 1732 case, the Lord Chancellor Hardwicke upheld Penn's title against a challenge from Lord Baltimore. *See id.* at 367-68. More than a century later, *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18,311), affirmed Delaware's sovereignty, in an analysis that this Court later praised as a "careful and able statement of the conflicting claims of right." 291 U.S. at 373, 377.

When the question of Delaware's sovereignty over the Delaware River subaqueous lands came before this Court in the 1930s, after a similar 1877 suit was dismissed in 1907 prior to resolution of the issue, the Court conclusively resolved the long-festering boundary dispute between the two States. The Court held that Delaware has sovereignty over the Delaware River within a circle of 12 miles about the town of New Castle, up to the low-water

mark on the east, or New Jersey, side of the river (the "twelve-mile circle"). *See id.* at 365. The Court rejected each of the bases on which New Jersey claimed title to the subaqueous soil of the Delaware River within the twelve-mile circle. *See id.* at 370-78. Of particular relevance here, the Court rejected New Jersey's claim that a compact entered into between the two States in 1905 caused Delaware to relinquish ownership of the land to New Jersey. *See id.* at 377-78.

On June 3, 1935, the Court entered a decree confirming its determination of the boundary between the States. *See New Jersey v. Delaware*, 295 U.S. 694 (1935). In the decree, the Court retained jurisdiction to issue "any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree, and for the purpose of a resurvey of said boundary line in case of physical changes in the mean low water line within said circle, or in the middle of the main ship channel below said circle, which may, under established rules of law, alter the location of such boundary line." *Id.* at 698. The decree stated that it was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states." *Id.* at 699.

B. The 1905 Compact

New Jersey and Delaware entered into the 1905 Compact after a long dispute between the States over fishing rights. In the spring of 1872, Delaware officials enforcing a Delaware fishing statute arrested New Jersey fishermen on the Delaware River within the twelve-mile circle. New Jersey protested that action and in 1877 filed a complaint in this Court challenging Delaware's exercise of such authority. *See* Lodging, Tab 1, at 6-50 (Rec. 1, No. 1 Orig., Oct. Term, 1884). That case remained dormant for many years until, in 1901, the Clerk of this Court directed that the case should be "forthwith proceeded with." *See id.*, Tab 3, at 4 (Letter from Herbert Ward, Attorney General of Delaware, to John Hunn, Governor of Delaware, at

4 (Jan. 31, 1903)); *see New Jersey v. Delaware*, 291 U.S. at 377.

Concurrent with the litigation in this Court, Delaware and New Jersey appointed commissioners to negotiate a settlement of the case. In 1905, the Delaware and New Jersey legislatures approved the Compact as proposed by the commissioners to resolve the fishing rights dispute within the twelve-mile circle. *See* Lodging, Tab 6 (23 Del. Laws ch. 5; 1905 N.J. Laws ch. 42, p. 67). Congress approved the Compact in January 1907. *See* NJ App. 1a-7a. In April 1907, New Jersey dismissed its complaint. *See New Jersey v. Delaware*, 205 U.S. 550 (1907).

As this Court explained in 1934 when adjudicating the States' boundary dispute, the 1905 Compact "provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery," but "[b]eyond that it *does not* go." 291 U.S. at 377-78. Indeed, this Court found New Jersey's assertion that the 1905 Compact cedes Delaware's ownership of the subaqueous lands within the twelve-mile circle to be "wholly without force." *Id.* at 377. In reaching that determination, the Court made special note of Article VIII of the 1905 Compact, *see id.* at 377-78, which expressly states that "[n]othing" in the Compact "shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." NJ App. 5a. This Court's 1935 Decree concerned only title to the Delaware River subaqueous land, and not any rights or authorities of the States that are the subject of the 1905 Compact.

The 1905 Compact contains nine articles. As Delaware's counsel explained in submitting the Compact to the Court as grounds for dismissing the 1877 original action filed by New Jersey, the "main purpose" of the Compact is "to provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware

River and Bay." Lodging, Tab 7, at 10 (Statement of Reasons).

Articles I and II resolve the issue that precipitated the filing of New Jersey's complaint in 1877: the arrest, by officials of one State, of citizens of the other State while on the Delaware River within the twelve-mile circle. Those articles set forth each State's jurisdiction to serve criminal process on the river. *See* NJ App. 2a-3a. Delaware and New Jersey can serve process based on crimes committed on, respectively, the western and eastern halves of the river. *See id.* Because the 1905 Compact does not resolve the boundary line within the twelve-mile circle, those Articles also give each State the right to serve process based on "an offense committed upon the soil of said State." *Id.*

Articles III through V create a framework for resolving the other portion of the controversy that had led to New Jersey's complaint: fishing rights. Article III declares the general principle that the inhabitants of both States "shall have and enjoy a common right of fishery" between the low-water marks on the river. *Id.* at 3a-4a. Article IV commits each State to the appointment of commissioners to draft uniform laws to regulate the catching and taking of fish in the Delaware River and Bay. *See id.* at 4a. Those uniform laws, upon adoption, were to become the sole laws regulating fishing in the river and bay. *See id.* Article IV also provides each State, in language that appears only in this article, with "exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery." *Id.* at 5a.[1] Article V permits laws not inconsistent with the common right to fish to continue in force

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[1] The States never effectuated the terms of Article IV. *See, e.g., Ampro Fisheries, Inc. v. Yaskin*, 588 A.2d 879, 883 (N.J. Super. Ct. App. Div. 1991) (describing New Jersey's contention that "the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws"), *aff'd in part and rev'd in part on other grounds*, 606 A.2d 1099 (N.J. 1992).

until the enactment of the concurrent legislation regarding fishery. *See id.*

Article VI provides that Articles III through V do not apply to the oyster and shellfish industries. *See id.* The States agreed to defer resolution of any disagreements regarding those industries. As Delaware's counsel stated to the Court, the Compact is "not a settlement of the disputed boundary, but a truce or *modus vivendi*." Lodging, Tab 7, at 10 (Statement of Reasons). A dispute over oyster beds in the Delaware Bay caused New Jersey to file the complaint in this Court that ultimately resolved Delaware's sovereignty over the lands within the twelve-mile circle.

Article VII addresses each State's power to define and to regulate the exercise of riparian rights, providing that each, "on its own side of the river, [may] continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." NJ App. 5a. At the time of the Compact, New Jersey exercised jurisdiction over riparian lands by statute rather than by common law. *See id.* at 26a-27a (Castagna Aff. ¶ 3).[2] Under the statutory regime in effect at the time, an owner of riparian lands[3] could obtain a "lease, grant or

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[2] At the time of the Compact, Delaware exercised jurisdiction over riparian rights by application of common law. *See, e.g., Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *10 (Del. Ch. 1882); *State v. Reybold*, 5 Harr. 484, 1854 WL 847 (Del. 1854); *Delaney v. Boston*, 2 Harr. 489, 1839 WL 165 (Del. Super. Ct. 1839). Delaware continues to recognize riparian rights at common law, subject to the State's "power to regulate or restrict private riparian property rights for public purposes." *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1168-69 (Del. 1992).

[3] New Jersey appears to refer to "riparian lands" as submerged lands, *see* Charles S. Boyer, *Waterways of New Jersey: History of Riparian Ownership and Control Over the Navigable Waters of New Jersey* 75 (1915), whereas most States use that term to describe the lands from the shore to the high-water mark or the low-water mark, *see* Robert E. Beck, *Waters and Water Rights* § 7.02(a) (2001 Replacement

conveyance" from New Jersey "of any lands under water in front of his lands," including the right to dredge out to navigable waters, but only on "lands of the state." DE App. 159a, 168a (4 N.J. Comp. St., Riparian Rights §§ 21, 37 (1911) (currently codified at N.J. Stat. Ann. §§ 12:3-10, 12:3-22)).[4] The Compact thus preserves New Jersey's ability to enforce, on "its own side of the river," NJ App. 5a, these statutes governing the use of riparian lands.

Article VIII generally reserved the States' rights, providing that "[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." *Id.*

Finally, Article IX sets forth a process for execution by the commissioners and ratification by Congress, stating that upon ratification the Compact would become "binding in perpetuity" upon both States and that the suit then pending would be "discontinued" without prejudice. *Id.* at 6a.

C. The Current Dispute Between BP And Delaware

In 2002, BP contacted the Delaware Department of Natural Resources and Environmental Control ("DNREC") regarding a proposal to construct a new LNG terminal on the Delaware River within Delaware's coastal zone, with associated onshore structures in New Jersey. *See* DE App. 4a (Cherry Aff. ¶ 8).[5] Despite the availability of other New Jersey sites outside Delaware's coastal zone, BP preferred the site within Delaware largely because of its proximity to natural gas pipelines.

Volume) ("*Beck's Waters and Water Rights*"); A. Dan Tarlock, *Law of Water Rights and Resources* § 3.35 (2005).

[4] These statutes are largely still in place and are compiled under Title 12 of the New Jersey Statutes entitled, "Commerce and Navigation."

[5] "Cherry Aff." refers to the Affidavit of Philip Cherry, which can be found at DE App. 1a-61a.

Id. On December 4, 2003, BP formally announced its plans to construct the new LNG terminal. *See* BP Press Release, *BP Announces Plans for US East Coast LNG Import Terminal* (Dec. 4, 2003), *available at* http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=2015800. BP expected the terminal to transmit up to 1.2 billion cubic feet of natural gas daily, and to connect to major pipeline systems serving the Northeast. *See id.*

BP's proposed terminal, named the Crown Landing project, would consist of an offshore unloading facility located in New Castle County, Delaware, in the Delaware River, as well as onshore LNG storage and processing tanks and buildings located in Gloucester County, New Jersey. The unloading facility would be designed to handle supertankers with cargo capacities of up to 200,000 cubic meters (more than 40 percent larger than the largest LNG ships in today's world fleet). BP expects that a ship would offload LNG at the facility every two to three days. *See* FERC, *Draft Environmental Impact Statement: Crown Landing LNG and Logan Lateral Projects* at 2-1 (Feb. 2005) ("Draft EIS"). The unloading facility would consist of a structure with a 2,000-foot-long trestle and a 6,000-square-foot unloading platform. *See* DE App. 5a (Cherry Aff. ¶ 14). An LNG transfer system would be installed on the unloading platform to transfer the LNG from the ship to three 150,000-cubic-meter storage tanks located onshore. The transfer system located on a structure built on Delaware's subaqueous lands would consist of three "unloading arms" for transfer of liquid to the storage tanks, an arm for the return of vapor to the ship, a "cryogenic transfer line" connecting the liquid unloading arms to the onshore tanks, a "vapor return line" connecting those tanks to the vapor return arm, and an additional cryogenic line.

Both the unloading structure and the transfer system are within Delaware's coastal zone. *See* Draft EIS at 4-92 ("Because the Crown Landing LNG Project would involve

construction of a new pier *and other facilities* within Delaware's coastal zone . . . , a determination on whether the facilities would be a permissible use under the DSCZA [Delaware State Coastal Zone Act] is required.") (emphasis added). The unloading facility would require the dredging of 800,000 cubic yards of Delaware subaqueous soil,[6] covering an area larger than 27 acres. *See* NJ App. 135a (Segal Aff. ¶ 4); Draft EIS at 2-15; DE App. 5a (Cherry Aff. ¶ 13).

Before it can construct its proposed project, BP must obtain approval from the Federal Energy Regulatory Commission ("FERC") under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a); from the U.S. Army Corps of Engineers ("Corps") under § 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403, and § 404 of the Clean Water Act of 1977, 33 U.S.C. § 1344; from the U.S. Coast Guard pursuant to Coast Guard regulations, 33 C.F.R. Pts. 66 and 127; and from New Jersey and Delaware under the Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. §§ 1451 *et seq.* *See* Draft EIS at 1-4 to 1-10 (listing major permits, approvals, and consultations required for the Crown Landing project).

The CZMA prevents FERC from granting a permit for an activity that affects a State's coastal zone unless the State agrees with the applicant that the activity complies with the State's federally approved coastal management plan, or the Secretary of Commerce specifically finds that the activity is consistent with the objectives of the CZMA or necessary for national security. *See* 16 U.S.C. § 1456(c)(3)(A); *see also* Draft EIS at 4-91 ("any federal action (e.g., a project requiring federally issued licenses or permits) that takes place within a state's coastal zone

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[6] For comparison, 800,000 cubic yards is the rough equivalent of 67,000 to 80,000 dump trucks worth of soil. *See, e.g.*, State of Alaska, Department of Natural Resources, *Fact Sheet: Material Sale in Alaska* (Feb. 2004) ("A standard dump truck has a capacity of 10-12 cubic yards."), *at* http://www.dnr.state.ak.us/mlw/factsht/material_sites.pdf.

must be found to be consistent with state coastal policies before federal action can take place").

Both Delaware and New Jersey have federally approved coastal management programs. Delaware's program includes the Delaware Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.* ("DCZA"), which prohibits "[h]eavy industry uses of any kind" and "offshore gas, liquid or solid bulk product transfer facilities" within the coastal zone, *id.* § 7003. The Act defines "bulk product transfer facilities" as

> any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

Id. § 7002(f). In 1979, the National Oceanic and Atmospheric Administration ("NOAA") concluded that Delaware's coastal management program fulfilled the requirements of the CZMA. *See* Findings of Robert W. Knecht, Assistant Administrator for Coastal Zone Management, NOAA, Approval of the Delaware Coastal Management Program (Aug. 21, 1979) ("Findings").[7] The prior year, 1978, New Jersey's coastal management program had similarly received approval from NOAA. New Jersey's program includes its Waterfront Development Act,

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[7] In its findings on Delaware's program, NOAA noted that some commentators had questioned whether the program "adequately considers the national interest," Findings at 7, and that FERC specifically had expressed concern about the prohibition of bulk transfer facilities, *id.* at 25. However, NOAA concluded that "Delaware recognizes its role in satisfying the national interest," and that the prohibition of certain facilities in a limited area was "justified on the ground of balancing the national need for facilities with the national interest in recreation and preservation of natural resources." *Id.* at 26.

N.J. Stat. Ann. § 12:5-3; Wetlands Act of 1970, N.J. Stat. Ann. §§ 13:9A-1 *et seq.*; and Tidelands Act, N.J. Stat. Ann. §§ 12:3-1 *et seq.*[8]

Just as FERC may not approve the Crown Landing project without prior certifications from New Jersey and Delaware, the Army Corps of Engineers similarly may not grant a permit until the applicant demonstrates compliance with state law. *See* 33 C.F.R. § 325.2(b)(2)(ii).

State approval, however, does not dictate the outcome of the federal regulatory process. As the lead agency with respect to the Crown Landing project, FERC is obligated under the National Environmental Policy Act of 1969 ("NEPA") to conduct a detailed review of the project's environmental impact and to consult with other federal agencies. *See* 42 U.S.C. § 4332. The Corps is similarly

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[8] There currently appears to be a disagreement among federal agencies as to whether the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 ("EPA05"), preempts States' regulation of LNG facilities under coastal management plans. *Compare* EPA05 § 311(c)(2), 119 Stat. 686, to be codified at 15 U.S.C. § 717b(d) ("Except as specifically provided in this Act, nothing in this Act affects the rights of States under . . . the Coastal Zone Management Act of 1972"), *with id.* § 311(c)(2), 119 Stat. 686, to be codified at 15 U.S.C. § 717b(e)(1) ("The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."). FERC has stated publicly that EPA05 does not alter States' rights under the CZMA to enforce their coastal management plans with respect to LNG projects. *See* FERC, *LNG – Laws and Regulations: States' Rights in Authorization of LNG Facilities* (updated Aug. 17, 2005), *available at* http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp. NOAA, however, has stated that, because of the "'exclusive authority' language [in the EPA05], some State CZMA enforceable policies that NOAA previously approved that would specifically apply to LNG or LNG-type facilities would likely no longer be enforceable for purposes of CZMA [federal] consistency reviews." Office of Ocean and Coastal Resource Management, NOAA, *Summary of Provisions of the Energy Policy Act of 2005 (Pub. L. No. 109-58) Relating to the Coastal Zone Management Act* at 1 (Sept. 23, 2005). Although Delaware believes that FERC's stated position correctly interprets EPA05, it is unclear when this dispute will ultimately be resolved.

obliged to determine whether the project is in the public interest. *See* Notice of Availability of the Draft Environmental Impact Statement, Crown Landing LLC, 70 Fed. Reg. 9297, 9298 (Feb. 25, 2005) ("Notice of Draft EIS") ("Department of the Army permit(s) will be granted by the [Corps] unless it is determined that the proposed work would be contrary to the public interest."). As explained below, neither FERC nor the Corps has completed the necessary review or made the necessary determinations with respect to the Crown Landing project. Moreover, New Jersey itself has not authorized the project under its coastal management program.

1. *Delaware's Permitting Process*

On December 7, 2004, BP formally applied to DNREC for a status determination under the DCZA for its proposal to construct an LNG supertanker terminal partially within the twelve-mile circle. *See* DE App. 5a (Cherry Aff. ¶ 11). In its application, BP claimed that its proposed offshore bulk product transfer facility was permissible under the DCZA. BP argued that its proposed facility fell within the exception from the prohibition on bulk product transfer facilities for "a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use." Del. Code Ann. tit. 7, § 7002(f). BP, however, expressly elected not to raise any claims that, as a result of the 1905 Compact, Delaware lacked jurisdiction to enforce the DCZA with respect to BP's proposed facility.[9]

On February 3, 2005, DNREC issued a status decision determining that BP's proposed project was prohibited

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[9] *See* Memorandum from David S. Swayze and Michael W. Teichman, Parkowski, Guerke & Swayze (counsel for Crown Landing), to John A. Hughes, Secretary, DNREC, at 1 n.3 (Dec. 7, 2004) (accompanying Request for a Coastal Zone Status Decision (Nov. 30, 2004)) (stating that "Crown Landing and BP reserve any and all rights with respect to the relative ability of the State of Delaware to regulate within the riparian jurisdiction granted under the Compact to the state of New Jersey").

under the DCZA. *See* DE App. 6a (Cherry Aff. ¶ 18). On behalf of DNREC, Secretary Hughes found that the "proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a 'manufacturing use' under the Act." *Id.* at 33a (Cherry Aff. Ex. G (DNREC Feb. 3, 2005 Legal Notice)).

On February 15, 2005, BP filed an administrative appeal to the Delaware Coastal Zone Industrial Control Board ("CZICB" or "Board"). Before the Board, BP again claimed only that its proposed facility was permitted under the DCZA and declined to raise any claims it might have based on the 1905 Compact.[10] On April 14, 2005, the Board unanimously affirmed DNREC's status decision. The Board found that the onshore component of the proposed facility was not a manufacturing facility, that the onshore component existed solely to support the offshore component, and that "[t]he real sole purpose of the proposed facility is to serve as a bulk product transfer facility." *Id.* at 57a (Cherry Aff. Ex. H at 7 (CZICB Decision and Order)); *id.* at 6a-7a (Cherry Aff. ¶ 19). The Board therefore concluded that "the proposed construction is absolutely prohibited by the Act." *Id.* at 61a (Cherry Aff. Ex. H at 10 (CZICB Decision and Order)).

BP chose not to exercise its right to appeal the decision of the CZICB to state court. Despite the fact that Delaware's denial of a permit under the DCZA was sufficient to require FERC to deny BP's permit, BP urged FERC to approve the Crown Landing project conditionally. *See* Crown Landing Response to FERC May 16, 2005 Additional Information Request at 3, Docket No. CP04-411-000 (FERC filed May 26, 2005). BP advised FERC that "New

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[10] *See* Memorandum of Law of Appellant Crown Landing, LLC at 1 n.1, *Coastal Zone Act Status Decision published February 3, 2005 in Respect of the Application of the Crown Landing LLC*, Docket No. 2005-1 (CZICB filed Mar. 23, 2005).

Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits" for the Crown Landing project. NJ App. 141a (Segal Decl. ¶ 21).

2. *New Jersey's Permitting Process*

On January 7, 2005, pursuant to New Jersey's Coastal Zone Management Rules,[11] which implement New Jersey's federally approved coastal management plan, BP filed a Waterfront Development Application with the New Jersey Department of Environmental Protection's Office of Dredging and Sediment Technology ("ODST"). Like the permit BP sought under the DCZA, approval of BP's Waterfront Development Application is a necessary precondition to FERC authorization of the Crown Landing project. New Jersey, however, has yet to approve BP's application.

On February 4, 2005, ODST notified BP that its application was deficient. *See* DE App. 84a-138a (Letter from David Q. Risilia, ODST, to David Blaha, Environmental Resources Management (Feb. 4, 2005)). ODST explained that the Crown Landing application lacked sufficient information to demonstrate compliance with numerous New Jersey rules, including, for example § 7:7E-3.5, regarding finfish migratory pathways; § 7:7E-3.7, regarding navigation channels; § 7:7E-3.15, regarding intertidal and subtidal shallows; § 7:7E-3.23, regarding filled water's edge; § 7:7E-3.27, regarding wetlands; and § 7:7E-3.38, regarding endangered or threatened wildlife or plant species habitats.

BP submitted a response to ODST's deficiency letter on May 16, 2005. On July 15, 2005, ODST sent BP a second deficiency letter, stating that its application was still inadequate under the Coastal Zone Management Rules, and accordingly "is not deemed complete for final review at this time, or for a public hearing pursuant to N.J.A.C. 4.4(b)(2)." Letter from David Q. Risilia, ODST, to David

[11] *See* N.J. Admin. Code §§ 7:7E *et seq.*

Blaha, Environmental Resources Management, at 1 (July 15, 2005).

3. *The FERC Process for Approval of the Crown Landing Project*

On September 16, 2004, BP filed with FERC an application under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a), requesting that FERC authorize construction of the Crown Landing LNG facility in Delaware's coastal zone. *See* Application of Crown Landing LLC for Section 3 Authorization To Construct Liquefied Natural Gas Import Facility, *Crown Landing LLC*, Docket No. CP04-411-000 (FERC filed Sept. 16, 2004) ("BP September 16, 2004 FERC Application"). On September 29, 2004, FERC issued a "Notice of Applications" and invited comments in support of or in opposition to the project. *See* Notice of Applications, Crown Landing LLC, 69 Fed. Reg. 59,906 (Oct. 6, 2004).

FERC is serving as the lead agency in conducting the environmental review of the Crown Landing proposal required by NEPA. FERC is cooperating with the other agencies whose regulatory responsibilities encompass the project, such as NOAA, the Fish and Wildlife Service ("FWS"), and the Environmental Protection Agency ("EPA"). *See* 42 U.S.C. § 4332 (requiring "the responsible Federal official" to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved"); 40 C.F.R. § 1501.6 ("the lead agency shall . . . [u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency").

On February 18, 2005, FERC released a draft Environmental Impact Statement ("EIS") for the Crown Landing project. The Draft EIS concluded that the adverse environmental impacts of the project would be limited *if* Crown Landing were to adopt FERC's recommended mitigation measures. *See* Draft EIS at ES-9. As part of its

analysis, FERC examined seven alternative sites for an LNG import facility in the mid-Atlantic region. Two of the alternative sites are south of the twelve-mile circle but within Delaware's coastal zone, whereas five are north of the twelve-mile circle and thus outside Delaware's coastal zone (because Delaware borders Pennsylvania at the north end of the twelve-mile circle). *See id.* at 3-32 to 3-41. FERC determined that the various alternatives were not preferable to the Crown Landing site because they did not offer "significant environmental advantages." *Id.* at 3-29; *see also id.* at 3-47 (rejecting pipeline system alternatives because they "would not offer any significant environmental benefits over the proposed facilities").

Several of the cooperating agencies have expressed reservations about the Draft EIS. For example, the Department of the Interior ("DOI") requested that FERC reconsider alternatives such as relocating the facility downriver or offshore in the Atlantic Ocean. *See* Letter from Michael Chezik, DOI, to Magalie Salas, FERC, at 5 (Apr. 13, 2005). DOI concluded that "fish and wildlife issues have not been adequately addressed" by FERC and that "new information is needed to adequately address those issues." *See id.* at 8-9. NOAA recommended that FERC more thoroughly investigate alternatives, *see* Letter from Susan Kennedy, NOAA, to Magalie Salas, FERC, at 5 (Apr. 18, 2005), and that it develop a mitigation plan for the loss of habitat, *see id.* at 4. EPA similarly indicated that it had "environmental concerns and that further information as described above is necessary," because the Draft EIS "does not include detailed mitigation plans, a discussion of general conformity, or thoroughly analyze the cumulative effects on navigation and the environment." Letter from John Filippelli, EPA, to Magalie Salas, FERC, at 3 (Apr. 14, 2005).

Both the New Jersey Department of Environmental Protection ("NJDEP") and DNREC have voiced concerns about the Crown Landing project and the Draft EIS.

NJDEP suggested that FERC consider the alternative of locating the facility offshore and noted that the proposed facility would block as much as 50 percent of the navigable portion of the river to commercial and recreational boating. *See* Letter from Kenneth Koschek, NJDEP, to Magalie Salas, FERC (Apr. 19, 2005).[12] DNREC, in addition to observing that the project is prohibited under the Delaware Coastal Zone Act, pointed out various deficiencies in the Draft EIS's analysis of alternatives. *See* Letter from John Hughes, DNREC, to Magalie Salas, FERC, at 2 (Apr. 13, 2005) ("[t]he Alternatives Analysis section of the [Draft] EIS was broad in scope but lacked specificity . . . [e]nviron-mental impacts were not quantified"). DNREC further observed that it was "premature to evaluate this project" from the perspective of marine safety "due to gaps in information pertaining to safety and security issues": "The U.S. Coast Guard has not weighed in on the feasibility of this project. . . . [I]t seems that the Coast Guard would be far from issuing a letter of recommendation." *Id.* at 4.

Not only has FERC yet to address these and other comments on the Draft EIS and to release a final EIS, it also has yet to complete its analysis of the Crown Landing project with respect to air quality. As required by the Clean Air Act, FERC prepared a Draft General Conformity Determination to assess the Crown Landing project's impact on air quality. *See Draft General Conformity Determination, Crown Landing LNG and Logan Lateral Projects*, Docket Nos. CP04-411-000 & CP04-416-000 (Aug. 26, 2005). FERC specifically noted that, because documentation supporting conformity with the applicable state plans for implementation of the Clean Air Act had not been filed with FERC, FERC's analysis was incomplete and it could not make a determination of conformity. *See id.* at 13.

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[12] The Delaware River is approximately one mile wide at the Crown Landing site. *See* DE App. 142a (Draft EIS at 3-28, Figure 3.3.3-1).

Moreover, the Corps has not yet evaluated whether the Crown Landing project is in the public interest, and therefore has not issued the necessary permits to BP under § 404 of the Clean Water Act, 33 U.S.C. § 1344, and § 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403. *See* Notice of Draft EIS, 70 Fed. Reg. at 9298 (explaining that the Corps' decision on whether to issue a permit "will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed projects on the public interest," and that factors considered include "conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply, . . . property ownership, and in general, the needs and welfare of the people"). Just as they did before FERC, federal agencies have urged the Corps to withhold its approval pending further analysis of alternatives and mitigation plans. *See, e.g.*, Letter from Clifford Day, DOI, to LTC Robert J. Ruch, Corps of Engineers, at 1 (Apr. 29, 2005) (summarizing FWS concerns, recommending "that the Corps resolve the below issues prior to any issuance of a Department of the Army (DA) permit," and enclosing copies of the NOAA and DOI comments on the Draft EIS).

Finally, the Coast Guard has yet to approve the Crown Landing project. *See* Crown Landing Informational Website, "What is the current status of the project?," *at* http://www.bpcrownlanding.com/go/doc/569/83864/ (last visited Oct. 21, 2005) ("The US Coast Guard is continuing its review of the river transit issues, working with the Area Maritime Security Committee to review safety and security issues associated with the river transit."); *see also* 33 C.F.R. Pt. 127, "Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas" (establishing safety and security requirements regarding waterfront LNG facilities to be enforced by the Coast Guard).

The various federal agencies involved in considering the Crown Landing project have not issued a timetable for when a decision will be made on the project.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two States. Indeed, New Jersey cannot identify any concrete injury to itself or its citizenry directly caused by Delaware's denial of a permit under the DCZA. Unmentioned in New Jersey's filing is that BP has yet to secure a permit under New Jersey's equivalent Coastal Zone Management Rules, and that FERC and other federal agencies cannot approve the BP plant unless and until the New Jersey permit is issued.

In an attempt to avoid this plain jurisdictional defect, New Jersey claims that its filing merely invokes this Court's retained jurisdiction to enforce its 1935 Decree. But that claim fails because the Decree did not address, much less adjudicate, the nature and scope of each State's riparian rights under the 1905 Compact, which is the ruling New Jersey seeks here. In any event, even if New Jersey had properly invoked this Court's original jurisdiction, this Court should decline to exercise that jurisdiction because BP, the real party in interest, had an adequate, alternative forum in which the issues presented here could have been litigated.

II. If this Court reaches the merits, it should reject New Jersey's broad assertion that it has "exclusive riparian jurisdiction" to approve projects that encroach on Delaware submerged lands without any say by Delaware. The law as it existed prior to 1905 would have rejected that assertion, because States traditionally have sovereignty over lands within their boundaries. The 1905 Compact, which expressly provides that each State shall "continue to exercise" riparian jurisdiction "on its own side of the river," did not alter the background legal rules. Although the parties conferred "exclusive" power in a State in certain circumstances, they did not do so with

respect to riparian rights. Thus, even if New Jersey has jurisdiction to decide certain aspects of riparian projects that traverse both States, the Compact does not divest Delaware of its sovereign right to determine whether a massive bulk transfer facility resting primarily on Delaware lands is consistent with the public trust and state laws implementing that trust.

III. Assuming this Court accepts jurisdiction over this case and chooses not to resolve it against New Jersey on summary grounds in this preliminary round of briefing, the Court should appoint a Special Master, consistent with its practice in comparable cases. A Special Master would be best positioned to consider, in the first instance, evidence about the status of each State's riparian rights within the twelve-mile circle prior to the 1905 Compact, the intent of each State in signing that Compact with respect to riparian rights, and the course of performance during the 100 years since the Compact was approved. A Special Master also would be best positioned to ensure that Delaware's right to pursue discovery on these complex, historical issues is protected.

ARGUMENT

I. THE COURT SHOULD DENY NEW JERSEY'S MOTION FOR LACK OF JURISDICTION

This Court long ago held that its original jurisdiction "is of so delicate and grave a character" that it "was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900); *see also Missouri v. Illinois*, 200 U.S. 496, 521 (1906) ("Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.").

New Jersey's request for declaratory and injunctive relief against Delaware — in which it can identify no con-

crete injury to itself and, instead, seeks only to further the interests of a private party that is not even a New Jersey citizen — cannot satisfy the prerequisites for the exercise of this Court's "extraordinary power under the Constitution to control the conduct of one state at the suit of another." *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Apparently recognizing this jurisdictional defect, New Jersey has captioned its request as one to re-open this Court's 1935 Decree resolving a prior boundary dispute between these two States, asserting that the current case is within this Court's retained jurisdiction over the 1935 Decree. New Jersey, however, has no serious argument that the supplemental decree it seeks here is one to "enforce" the 1935 Decree. Nor can New Jersey meet this Court's standard for invoking its original jurisdiction if its petition is to be treated as equivalent to an original complaint.

A. New Jersey's Motion Does Not Invoke This Court's Retained Jurisdiction To Enforce The 1935 Decree

The dispute between Delaware and New Jersey that resulted in the 1935 Decree was exclusively about the *boundary* between the States. *See, e.g.*, 291 U.S. at 363 (explaining that New Jersey "prays for a determination of the boundary in Delaware Bay and river"). To the extent this Court discussed riparian rights in reaching the decision that gave rise to the Decree, such discussion was only in the context of New Jersey's unsuccessful attempt to demonstrate its ownership of the land below the surface of the water. *See id.* at 376-78. Accordingly, this Court's 1935 Decree is limited to establishing the "real, certain, and true boundary line separating the states of New Jersey and Delaware." 295 U.S. at 694. This Court "retain[ed] jurisdiction" insofar as any future orders would be necessary for "the purpose of a resurvey of said boundary line" or "to carry into effect any of the provisions of this decree." *Id.* at 698.

New Jersey's latest dispute with Delaware pertains to riparian rights on subaqueous lands indisputably owned by Delaware. It does not call into question any aspect of this Court's determination of the boundary line between the two States or any other provision of the 1935 Decree. Indeed, New Jersey's motion identifies only two provisions of that Decree, neither of which is relevant to the instant dispute.

First, New Jersey points (at 18) to paragraph 6 of the Decree, which sets forth that both States are respectively enjoined from "disputing the sovereignty, jurisdiction, and dominion" of the other State over property that this Court held is owned by that State. *See* 295 U.S. at 698. New Jersey, however, does not claim that Delaware is disputing New Jersey's dominion over property *owned by New Jersey*. Instead, it claims that Delaware is infringing on New Jersey's rights over property *owned by Delaware*. Because those rights were not at issue in the prior case, they were not "adjudged to the state of New Jersey by th[e] decree." *Id.* An order with respect to New Jersey's asserted right to approve BP's project on land owned by Delaware without a veto by Delaware, therefore, would not be an order enforcing paragraph 6 of the 1935 Decree.

Second, New Jersey (at 18) points to statements in the Decree and this Court's 1934 Order that the resolution of the earlier boundary dispute was made "without prejudice to the rights of either state . . . by virtue of the compact of 1905 between said states." 295 U.S. at 699; *see* 291 U.S. at 385 (noting that Delaware's rights of ownership "[w]ithin the twelve-mile circle" are "subject to the Compact of 1905"). Contrary to New Jersey's claims, those statements did not create riparian rights that this Court could enforce through a later decree. Instead, this Court noted only that the riparian rights under the 1905 Compact -- whatever they were -- remained unaffected by the resolution of the boundary dispute. Determining the

scope of New Jersey's riparian rights, therefore, is not enforcing the 1935 Decree.[13]

For these reasons, New Jersey's motion does not fall within this Court's retained jurisdiction to enforce the 1935 Decree.

B. This Court Lacks Original Jurisdiction Over New Jersey's Motion, Even If Treated As A Motion For Leave To File A New Original Action

When New Jersey's motion is viewed as a request to initiate a new original action, it is clear that New Jersey has not satisfied its burden of demonstrating that a case or controversy exists between New Jersey and Delaware.

1. New Jersey cannot demonstrate any "injury" caused by Delaware

As this Court has repeatedly held, for a case to come within this Court's original jurisdiction, the "complaining State" must allege that it "has suffered a wrong through the action of the other State," *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939), and "must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State," *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (per curiam). In making that showing, "the burden on the complainant state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties." *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *see also Alabama v. Arizona*, 291 U.S. 286, 292 (1934) ("The burden upon the plaintiff state fully and clearly to establish all essential elements of its case is greater than that generally required to be borne

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[13] Nor is there reason for this Court "to confirm that the 1935 Decree protects New Jersey's rights under the Compact." NJ Br. 18. Delaware does not argue that the 1935 Decree altered or reduced New Jersey's rights under the Compact, except insofar as this Court's clarification of the proper boundary between the two States necessarily affected the States' rights as addressed in the 1905 Compact.

by one seeking an injunction in a suit between private parties.").

As an initial matter, New Jersey has not demonstrated that it has suffered any injury that was "directly caused" by Delaware. New Jersey cannot demonstrate injury from Delaware's denial of the DCZA permit for the Crown Landing project because *New Jersey itself* has yet to approve BP's application for approval under New Jersey's Coastal Zone Management Rules. *See supra* pp. 16-17. Instead, the New Jersey agency has twice found BP's application to be deficient, with the most recent notice of deficiency sent just two weeks before New Jersey filed the instant Motion. Under the federal CZMA, approval of BP's New Jersey application is a necessary prerequisite to FERC's approval of the Crown Landing project.

In addition, even aside from the Delaware and New Jersey coastal zone permits, FERC could well deny BP the necessary federal permit on other grounds. *See* 16 U.S.C. § 1456(c)(3)(A). As discussed above, FERC has not yet completed its review of the Crown Landing proposal and is still considering numerous comments -- including from the NJDEP -- in opposition to its Draft EIS. FERC also has not made determinations under the Clean Air Act that are necessary for the ultimate approval of the Crown Landing project. FERC, therefore, could refuse to authorize construction irrespective of Delaware's denial of a permit. The same is true of the Corps and the Coast Guard, both of which have yet to complete their reviews of the project. *See supra* pp. 17-20.

Until the administrative processes before the New Jersey and federal agencies are completed, it is completely speculative whether Delaware's action is the conclusive event in causing BP's permit application to be denied. Therefore, New Jersey has not suffered any injury at this time, let alone one directly caused by Delaware. *See, e.g., Alabama v. Arizona*, 291 U.S. at 292 (original jurisdiction will not be exercised unless the "threatened injury is

clearly shown to be of serious magnitude and imminent").[14]

In addition, as discussed above, the record compiled before FERC shows that there are five other locations in close proximity to the Crown Landing site on the New Jersey coastline, all of which are outside the twelve-mile circle, where BP could have chosen to build its proposed LNG terminal. *See supra* pp. 17-18. Because those locations would not involve the use of Delaware's lands, Delaware would not have authority to require BP to obtain the same types of permits under Delaware laws as are required for the Crown Landing site. BP's selection of the Crown Landing site was based on its commercial reasons, *see supra* pp. 9-10, not because of any sovereign interest of New Jersey. Those alternate locations would provide the same economic benefits to New Jersey that the State claims it is being denied due to Delaware's action, everything from jobs for its citizens to lost revenue for its school programs. *See* NJ Br. 21-22. But, because BP could construct the bulk product transfer facility at a location that would not implicate Delaware's sovereign interests, the only conceivable injury sustained by Delaware's action is to BP's economic interest in obtaining the Crown Landing site. The invocation of this Court's original jurisdiction, however, rests on the *State's* injury, and not that of a private party. *See, e.g., Illinois v. Michigan*, 409 U.S. 36, 37 (1972) (per curiam); *Louisiana v. Texas*, 176 U.S. at 16; *infra* pp. 30-31.[15]

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[14] This is not a case like *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), in which the Court exercised original jurisdiction based on its finding that the threatened injury — from a West Virginia statute that placed a "direct and certain," "positive duty" on pipelines in West Virginia, on pain of "penal" sanctions, to satisfy in-state demand before selling to out-of-state consumers — was "certainly impending." *Id.* at 593. Here, in contrast, the DCZA permit that was denied is only one of a number of required approvals that BP has not yet obtained and may not obtain.

[15] The pendency of administrative actions in New Jersey and before the United States government that could cause the relocation of BP's

Given that Delaware's denial of permits required for the Crown Landing project does not foreclose the possibility that New Jersey could obtain the same benefits for its citizens if the LNG facility were located elsewhere, New Jersey cannot establish the injury requisite to an invocation of this Court's original jurisdiction. In any event, any dispute that might ultimately arise if New Jersey were somehow injured concretely clearly is not ripe now.

New Jersey's other claims of injury from Delaware's exercise of its authority within the twelve-mile circle with respect to projects other than Crown Landing are plainly insufficient to support the exercise of this Court's original jurisdiction.

Other than BP's request for a permit, New Jersey points to only two instances in which Delaware has required a permit under either the DCZA or the DSLA for projects built out from New Jersey's coastline and within the twelve-mile circle. As New Jersey concedes, Delaware *granted* those other permits. *See* Petition ¶¶ 23, 25 (Logan Generating was granted DCZA and DSLA permits); *id.* ¶ 25 (Fenwick Commons was granted a DSLA permit). Therefore, New Jersey suffered no cognizable injury with respect to those projects.

Left without any concrete injury, New Jersey falls back on the assertion that Delaware's insistence on exercising its rights within the twelve-mile circle "threaten[s] the construction of projects by the State of New Jersey itself." *Id.* ¶ 37. Tellingly, New Jersey does not identify a single such project, pending or contemplated. This Court has previously treated such allegations of "injury to the State as proprietor merely as a 'makeweight.'" *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945); *see also, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions [to visit locations to observe animal species] – without any description of concrete

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proposed LNG facility amplify the speculative nature of New Jersey's proffered injury at this time.

plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require").

Similarly, New Jersey asserts that Delaware's exercise of its permitting authority within the twelve-mile circle "may discourage economic development along this part of New Jersey's shoreline," which in turn may "diminish the income received by the State of New Jersey for conveyances and leases of riparian lands." Petition ¶¶ 36, 38. This Court has previously rejected invocations of its original jurisdiction based on such "purely speculative, and, at most, only remote and indirect" allegations of injury. *Florida v. Mellon*, 273 U.S. 12, 18 (1927).

Thus, New Jersey seeks to use this Court's original jurisdiction "to consider abstract questions," such as "questions respecting the right of the plaintiff state . . . to use the waters . . . in the indefinite future." *New York v. Illinois*, 274 U.S. 488, 489-90 (1927). As this Court has held, it is "not at liberty" to grant such requests. *Id.* at 490; *see Massachusetts v. Missouri*, 308 U.S. at 17 ("Nor does the nature of the suit as one to obtain a declaratory judgment aid the complainant. To support jurisdiction to give such relief, there must still be a controversy in the constitutional sense and as between the two States there is no such controversy here.") (citation omitted). Indeed, in a comparable case, this Court agreed with New Jersey in a suit brought by New York. This Court held that New York had not yet suffered any injury and dismissed the suit "without prejudice to a renewal of the application for injunction if the operation of the sewer of [New Jersey] shall result in conditions which the state of New York may be advised requires the interposition of this court." *New York v. New Jersey*, 256 U.S. at 314.[16]

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[16] This is not a case like *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), where the Court permitted Wyoming to bring suit to challenge an Oklahoma statute designed to limit importations of Wyoming coal. There, even though "Wyoming does not itself sell coal, it does impose a severance tax upon the privilege of severing or extracting coal from

2. BP, not New Jersey, is the real party in interest

Wholly apart from New Jersey's lack of a concrete injury caused by Delaware, this Court also lacks original jurisdiction over New Jersey's motion for an independent reason: BP, not New Jersey, is the real party in interest. As this Court has held, "it is not enough that a State is plaintiff" to invoke this Court's original jurisdiction; rather, this Court "must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest." *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-93 (1938). Where a suit is brought "in the name of the State but in reality for the benefit of particular individuals" — and even where "the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy" -- this Court has refused "resort to [its] original jurisdiction." *Id.* at 394; *see Illinois v. Michigan*, 409 U.S. at 37 (finding that it lacked original jurisdiction where a State, "though nominally a party, is here 'in vindication of the grievances of particular individuals'"); *Massachusetts v. Missouri*, 308 U.S. at 17 ("Massachusetts may not invoke our jurisdiction for the benefit of such individuals."); *North Dakota v. Minnesota*, 263 U.S. at 375-76 (explaining that a State cannot invoke the Court's original jurisdiction "to present and enforce individual claims of its citizens as their trustee against a sister state"); *Louisiana v. Texas*, 176 U.S. at 16 (holding that "to maintain [original] jurisdiction . . . it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals").[17]

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land within its boundaries," and Oklahoma's statute had "directly affect[ed] Wyoming's ability to collect severance tax revenues," by depriving it of actual revenues. *Id.* at 442, 445, 451, 452 & n.10.

[17] Although this Court has exercised jurisdiction in cases where a State acts "as the representative of its citizens in original actions

Here, there can be no serious dispute that the real party in interest with respect to the construction of the Crown Landing facility is BP — which is not even a New Jersey citizen.[18] As shown above, it is for BP's commercial reasons, and not for New Jersey's government interests, that BP prefers the Crown Landing location to other possible locations on the New Jersey coastline that would not be subject to Delaware's permitting authority.[19]

Contrary to New Jersey's assertion (at 19-20), this case is not like *Virginia v. Maryland*, 540 U.S. 56 (2003). In that case, Virginia sued on behalf of a governmental entity, the Fairfax County Water Authority ("FCWA"), rather than a private corporation. *See id.* at 63-64. In addition, the FCWA sought a permit from Maryland to construct a water-intake structure to provide water specifically for the benefit of residents of Fairfax County, *see*

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where the injury alleged affects the general population of a State in a substantial way." *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981), that is not the case here, where New Jersey is acting for the specific benefit of a single corporation. *Cf. North Dakota v. Minnesota*, 263 U.S. at 375-76 (recognizing the "right of a state as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another state").

[18] Neither BP nor Crown Landing, LLC is incorporated in New Jersey or has its principal place of business there. Crown Landing, LLC is a Delaware LLC formed on November 20, 2003, and its only member is BP America Production Company, a Delaware corporation that is a fifth-tier subsidiary of BP p.l.c., which is organized under the laws of England and Wales with its principal place of business in London, England. BP formed Crown Landing, LLC specifically to manage the LNG Terminal site. Crown Landing's principal place of business is 501 Westlake Park, Houston, Texas. Crown Landing, LLC does not have any customers, so the proposed LNG project does not have any impact on current customers' transportation rates or service. *See* BP September 16, 2004 FERC Application.

[19] It would be no answer for New Jersey to argue on reply that it has a sovereign interest in where BP's facility is situated, and that the assertion of interest is sufficient to create original jurisdiction in this Court. Such an interest surely must give way when reasonable alternatives exist to the encroachment on a neighboring State's lands.

id., and not for the benefit of a corporation's private shareholders. Virginia had no alternative sites along the river that were outside of Maryland's authority. Finally, Maryland took more than five years to reach a final decision on the FCWA's permit application, which it eventually granted subject to a condition — uniquely imposed on that one project — that severely reduced the utility of the water-intake structure and that was imposed pursuant to special legislation directed at this project. *See id.*

C. Even If This Court Has Original Jurisdiction Over New Jersey's Motion, It Should Decline To Exercise That Jurisdiction

Even in instances in which the Court has *both* original and exclusive jurisdiction, it may "exercise[] [its] discretion not to accept original actions." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *see also Louisiana v. Mississippi*, 488 U.S. 990 (1988) (declining to exercise its exclusive jurisdiction over a boundary dispute between two States). If this Court were to find that New Jersey's motion is within its original jurisdiction, the Court should exercise its discretion and decline to accept jurisdiction over that motion.

In "[d]etermining whether a case is 'appropriate' for [its] original jurisdiction," this Court considers two factors: "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim," and "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77 (internal quotation marks and citation omitted); *see, e.g., California v. Texas*, 457 U.S. 164, 168 (1982) (per curiam) (same). Parts I.A and I.B above establish that New Jersey's claims of injury based on the alleged infringement of its riparian rights are speculative and insubstantial, and that BP (and not New Jersey) is the real party in interest in this action.

In addition, an alternative forum existed for consideration of Delaware's authority to require a DCZA permit for the Crown Landing facility — namely, an appeal to state

court of the CZICB's decision to affirm the Secretary's denial of the DCZA permit. New Jersey relies on BP's claim that such an appeal would have been "futile," in light of Delaware Code Annotated title 7, § 7008, which normally limits review of a Board decision to "whether the Board abused its discretion in applying standards set forth by [Chapter 70] and regulations issued pursuant thereto to the facts of the particular case." *See* NJ App. 140a-141a (Segal Decl. ¶ 19).

But Delaware courts have made clear that the Superior Court, in an appeal from a decision under the DCZA, has jurisdiction to hear claims that the Board's decision "on the subject of the . . . permit was not a valid decision of the Board." *Shields v. Keystone Cogeneration Sys., Inc.*, 611 A.2d 502, 507 (Del. Super. Ct. 1991). In that case, a party challenged the grant of a DCZA permit on the ground that "there was no valid Board action in this matter," because the decision was made by the "vote of four members of the nine member Board," rather than the majority of a quorum. *Id.* at 505, 507. In holding that it had jurisdiction to hear such a claim, which goes beyond the specific matters listed in § 7008, the court explained that "the customary appeal standard could not be applied" where there was no valid decision of the Board. *Id.* at 505.

In this case, BP could have raised on appeal the contention New Jersey makes in this Court — that the Board (and the Secretary) had no legal basis to require a DCZA permit for the Crown Landing project because New Jersey's alleged riparian rights prevent the application of Delaware's DCZA to the Crown Landing project. Moreover, New Jersey itself could have appealed the Board's decision on that ground, even after BP chose not to do so.[20] Final judgments of the Superior Court can be di-

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[20] *See* Del. Code Ann. tit. 7, § 7008 ("[a]ny person aggrieved by a final order of the State Coastal Zone Industrial Control Board . . . may appeal the Board's decision to Superior Court").

rectly appealed to the Supreme Court of Delaware. *See* Del. Const. art. IV, § 11(1)(a). BP or New Jersey could then have sought this Court's review of the issue in the normal course, through a petition for a writ of certiorari.

This Court has previously refused, in a case alleging a violation of an interstate agreement with the "dignity of an interstate compact," to exercise its original jurisdiction to hear a dispute between two States where, as here, review could have been sought by a petition for a writ of certiorari, even though it was by then "too late for any such petition for certiorari to be filed." *Illinois v. Michigan*, 409 U.S. at 36-37. In that case, the Court explained that its "original jurisdiction . . . is not an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought." *Id.* at 37.[21]

Although New Jersey asserts (at 20) that "a Delaware venue clearly would not provide New Jersey an adequate forum" to raise the issue presented here, this Court has previously rejected such a claim. In *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam), the Court held that a "pending state-court action [in New Mexico] provide[d] an appropriate forum in which the *issues* tendered here [by Arizona] may be litigated." *Id.* at 797; *see also id.* (explaining that, if Arizona did not prevail before the

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[21] New Jersey's reliance (Br. 20) on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), is misplaced. In that case, Wyoming had alleged a direct injury to itself, as sovereign, and this Court found that "Wyoming's interests would not [have] be[en] directly represented" in a separate action that might have been brought by Wyoming companies more directly affected by the dispute. *Id.* at 442, 445, 451-53 & n.10. In those circumstances, this Court exercised its original jurisdiction over Wyoming's challenge to an Oklahoma statute, finding that "no pending action exists to which we could defer adjudication on this issue." *Id.* at 452. Here, by contrast, the Delaware courts would have permitted BP or New Jersey to raise on appeal the claim that the Delaware agency's conclusion that Crown Landing was subject to the DCZA was *ultra vires* or otherwise improper because of the 1905 Compact.

"New Mexico Supreme Court, . . . the issues raised now may be brought to this Court by way of direct appeal").

II. DELAWARE HAS THE AUTHORITY UNDER THE 1905 COMPACT TO REGULATE RIPARIAN STRUCTURES ERECTED ON DELAWARE'S SUBMERGED LANDS

If the Court reaches the merits of New Jersey's request at this time, it should reject New Jersey's motion to reopen or for supplemental decree.[22] At the time the 1905 Compact was drafted, there was widespread disagreement over the scope of "riparian" rights enjoyed by a landowner adjacent to navigable waters. Much depended on the legal context — whether a particular jurisdiction incorporated the English common law, changed that law by statute, or developed other principles through other sources of law. *See generally* 1 Henry P. Farnham, *The Law of Waters and Water Rights* 279 (1904) ("*Farnham's Law of Waters*"). As Farnham explained in his 1904 treatise, "[t]he courts do not fully agree in their enumeration of these [riparian] rights." *Id.* In general terms, "riparian" rights refer to the cluster of rights an owner of land adjacent to waterways had of "access" to the waterway; "preference in case the land under the water is to be sold"; "accretion and the preferential right to fill out into the water if such filling is permitted by the public"; and "free use of the water space immediately adjoining his property for the transaction of such business as may be necessary in connection with wharves or structures erected by him." *Id.* at 279-80. But, as Farnham cautions, "all of the courts have not recognized some of the rights above enumerated," *id.* at 280, and certain of those rights — such as the

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[22] Our submission here is that New Jersey's motion to invoke this Court's original jurisdiction should be denied because New Jersey's reading of the 1905 Compact is untenable. We reserve the right to file an Answer to New Jersey's petition and to address New Jersey's theories and evidence more fully in the event this Court grants New Jersey's motion and directs the parties to address the merits.

right to wharf out from the shore -- are "subject to several limitations," *id.* at 279.

Although at this preliminary stage in this proceeding it is not possible to define comprehensively all of the rights and duties — or the limitations thereon -- a New Jersey landowner with riparian rights would have with respect to Delaware lands within the twelve-mile circle, the Court at this time may reject New Jersey's principal submission: that New Jersey has "exclusive" jurisdiction to authorize a riparian landowner on New Jersey's shore to build a bulk transfer facility on Delaware's submerged lands.[23] No such right was recognized prior to 1905; the Compact did not change that result; New Jersey's arguments to the contrary are unpersuasive; and this Court's recent decision in *Virginia v. Maryland* does not support New Jersey's assertion.

A. Prior To The 1905 Compact, Delaware Unquestionably Had The Authority To Regulate Or To Exclude Altogether On Delaware Submerged Lands A Structure Such As BP's LNG Bulk Transfer Facility

1. As owner of the tidal lands in question, Delaware holds the lands in a public trust for the people

In numerous cases, this Court has recognized the bedrock principle that "[o]wnership of submerged lands -- which carries with it the power to control navigation, fishing, and other public uses of water — is an essential attribute of sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997); *see also, e.g., Montana v. United States*, 450 U.S. 544, 551 (1981) ("[T]he ownership of land under

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[23] If the Court has any doubt on that score or believes that New Jersey's questions presented require a more comprehensive treatment of the meaning of "riparian jurisdiction" outside the specific confines of the dispute over BP's Crown Landing proposal, the appropriate disposition would be to appoint a Special Master so that the law of riparian rights, as reasonably understood by the parties and incorporated into the 1905 Compact, may be more fully explored.

navigable waters is an incident of sovereignty."). Those attributes of sovereignty necessarily extend to the limits of the sovereign's boundary, for, as this Court has long held, "when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes some cession." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838).

A state holds its lands in trust for the people, and that principle extends as well to submerged lands, which are treated with the same incidents of sovereignty as uplands. For that reason, a court considering the scope of an incursion on the "'title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *United States v. Alaska*, 521 U.S. at 34 (quoting *Montana v. United States*, 450 U.S. at 552) (ellipsis in original).

That presumption against any impairment to the title of a State's submerged lands derives from the fact that a State's "title to soils under tide water" "is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).[24] To be sure, a State may convey property for the purpose of erecting a wharf to aid navigation, "consistent[] with the trust to the public upon which such lands are held by the State." *Id.* But "[t]he State can no more abdicate its trust over prop-

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[24] This rule had its origins in England, where, at "'common law, the title and dominion in lands flowed by tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.'" *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988) (ellipsis in original) (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)); *see also Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410-12 (1842).

erty in which the whole people are interested, like navigable waters and the soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453.

That incidence of public trust in submerged lands acts as a check against efforts by legislators and other government officials to relinquish the power and authority of a State over those lands. This Court found the public trust to be so strong in *Illinois Central*, for example, that it held the Illinois legislature's transfer to a railroad of title to a large part of the Chicago harbor in Lake Michigan to be "beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) (citing *Illinois Central*, 146 U.S. at 455-60). While that holding "was necessarily a statement of Illinois law, it invoked the principle in American law recognizing the weighty public interests in submerged lands." *Id.* (internal quotation marks and citation omitted). Indeed, New Jersey courts have interpreted *Illinois Central* to stand for the principle that, "[a]lthough the states have the inherent authority to convey riparian grants to private persons, the sovereign never waives its right to regulate the use of public trust property." *Karam v. New Jersey Dep't of Envtl. Protection*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) (citation omitted), *aff'd*, 723 A.2d 943 (N.J. 1999). Delaware could conceivably convey its submerged lands for use by private persons, but it would still retain its regulatory authority over those lands as part of its public trust responsibility.

That public trust principle does not, however, ordinarily extend beyond the boundaries of the State's territory, even when the boundary is determined by a body of water. As Farnham explains, "[i]n the absence of an agreement or understanding between the opposite states, the jurisdiction of each is limited to its own side of the stream, and does not extend beyond its boundary." 1 *Farnham's Law*

of Waters at 31; *see also id.* at 39 ("Whatever acts involve title to the soil are exclusively under the jurisdiction of the owner of the soil. . . . [But a state] cannot pass a law to govern another state, or realty situated therein."); *see also Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 622 (1899) ("Whatever jurisdiction the State of Indiana may properly exercise over the Ohio River, it cannot tax this bridge structure south of low-water mark on that river, for the obvious reason that it is beyond the limits of that State and permanently within the limits of Kentucky.").[25]

As the understanding of a sovereign's ownership of submerged lands evolved, the courts came to recognize two distinct aspects of this sovereignty — the right of ownership and the right of conservation:

> The right of the crown in navigable waters is twofold, the right of property, and the right of conservation; and these rights are perfectly distinct, and may be transferred and separated. The right of conservation of a river may be given to the corporation of a city as far as the tide flows, but they are not thus made owners of the soil or bed of such river. And the ownership of soil, and the license of conservation, are not sufficient to legalize an erection in tide river; for the question of nuisance or not, may still be raised.

Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 202-03 (1847).

In the late nineteenth century, therefore, a court addressing the issue raised here would have concluded that

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[25] While not at issue in this case, a state's sovereign power over navigable waters is subject "to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government." *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

Delaware holds its submerged lands in trust for the people of the State, that one of the incidents of sovereignty is "the right of conservation," and that Delaware could not lightly be held to have relinquished its trust lands to another sovereign or a private party. For those reasons, the action taken by Delaware here – to deny a permit to BP to construct a massive bulk product transfer facility requiring the dredging of 800,000 cubic yards of soil over 27 acres of submerged lands – was perfectly consistent with its responsibility to hold those lands in trust for the people of Delaware.

2. Even without a public trust relationship, Delaware has police authority to regulate uses of its submerged lands

In addition to the established law that submerged lands owned by the sovereign are held in a public trust, riparian rights have always been deemed to be "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871). That restriction is especially true of the right to wharf out, on which New Jersey relies.

The law appears never to have recognized an absolute right on the part of a riparian landowner to conduct whatever activities it wants simply because they occur on a wharf. Justice Holmes explained in 1908 that "it is recognized" that States may "by statute" pass laws "to protect the atmosphere, the water and the forests within its territory," based on a "principle of public interest and the police power." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355-56 (1908). Thus, "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). That same expansive police power necessarily operates to per-

mit a State to impose reasonable restrictions on the exercise of riparian rights.

Had the 1905 Compact never been executed, there could be no question that Delaware would have sovereign authority all the way to the boundary between the two States, which this Court held in 1934 extends to the low-water mark on the New Jersey shore within the twelve-mile circle. As a leading water rights treatise of the day explained, "[i]f one state owns the whole river, it may enact and enforce laws as far as the opposite shore, since the whole river is within its territorial jurisdiction." 1 *Farnham's Law of Waters* at 38-39. The territorial jurisdiction supports the exercise of police power, and that jurisdiction and power extend to the State's boundary.

3. Under New Jersey law, the owner of riparian lands could not build structures on navigable waters on submerged lands the landowner did not own

Even if there were any doubt about the foregoing principles and how they would support a decision by Delaware not to permit its submerged lands to be used for a massive bulk product transfer facility, BP would have had no right to build its structures on those submerged lands under New Jersey law. In the nineteenth century, courts varied as to whether they recognized the right of owners of riparian lands to build on adjoining submerged lands that they did not own. In some States, for example, riparian rights "rest[ed] on title to the bank, and not upon title to the soil under the water." *Northern Pine-Land Co. v. Bigelow*, 54 N.W. 496, 498 (Wis. 1893) (internal quotation marks omitted); *see also, e.g., In re West 205th Street in City of New York*, 147 N.E. 361, 362 (N.Y. 1925) ("Riparian rights . . . are not dependent upon ownership of the shore, and are the same, whether or not the riparian owner owns the soil under water."). In Florida, however, the statutory rule was that a riparian landowner had to own property down to the ordinary low-water mark in order to be a

"riparian proprietor" for certain purposes. *Axline v. Shaw*, 17 So. 411, 414 (Fla. 1895).

In New Jersey, by contrast, a landowner has been required to acquire from the government a protectible property interest in the submerged land on which a structure is built to be able to enjoy that aspect of riparian rights. *See, e.g., Beck's Waters and Water Rights* § 7.02(a)(1) (collecting cases); NJ App. 27a (Castagna Aff. ¶ 4) ("Riparian owners have a preemptive right to apply to the State of New Jersey to lease or purchase the State's tidal land in front of their upland. N.J. Stat. Ann. § 12:3-7 (enacted in 1869.) A sale or lease to one who is not an upland owner must be with the consent of the upland owner or on six month's notice to the upland owner. N.J. Stat. Ann. § 12:3-9 (enacted 1869.) Otherwise, the grant or lease will be void. *Shamberg v. Board of Riparian Commissioners*, 43 N.J.L. 132, 60 A. 43 (Sup. Ct. 1905.)."). Thus, had this issue arisen prior to execution of the 1905 Compact, BP would not have had a right under New Jersey law to build its facility beyond the limit of its own territorial ownership -- and certainly not 2,000 feet beyond that boundary into Delaware's sovereign-owned subaqueous lands -- unless the landowner (Delaware) gave its permission.

4. Nothing in pre-1905 riparian rights law would have led the States to think that Delaware lacked authority to regulate a massive 2,000-foot-long structure extending onto its sovereign lands

Even under New Jersey common law, a riparian landowner did not enjoy an exclusive right to build on a sovereign's submerged lands without being subject to any regulatory authority. *See, e.g., Bailey v. Driscoll*, 112 A.2d 3, 13 (N.J. Super. Ct. App. Div.), *aff'd in part and rev'd in part on other grounds*, 117 A.2d 265 (N.J. 1955). In *Bailey*, the court held that, "by the common law, the ownership of all lands under tidewater below high water mark within the territorial limits of the State belonged to the

Crown of England, did not pass to the proprietors of New Jersey under the grant from the Duke of York, and became vested by the Revolution in the sovereignty of the State under the guardianship of the Legislature." *Id.* As this Court likewise observed, "'[i]n the examination of the effect to be given to the riparian laws of the State of New Jersey,' . . . 'it is to be borne in mind that the lands below high water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, property of the State as sovereign.'" *Shively v. Bowlby*, 152 U.S. at 21-22 (quoting *Hoboken v. Pennsylvania R.R. Co.*, 124 U.S. 656, 688 (1888)). Thus, "all navigable waters within the territorial limits of the State, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate; and that the privileges he possesses by the local custom or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature." *Id.* at 22 (internal quotation marks omitted).

The *Bailey* court further recognized New Jersey's law as holding that each State is free "to determine over what submerged lands its sovereign prerogative of ownership shall be exercised (56 Am.Jur. § 461) and that each state may similarly deal with such lands 'according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public * * *.' 56 Am.Jur. § 471, p. 884." 112 A.2d at 13.

Two limitations on wharfage were routinely recognized in nineteenth century cases: the common law of nuisance and the State's police power to decide if the wharf was in the public interest. The first limitation provided that "every erection in a navigable river, which obstructs or hinders the navigation, is a nuisance." *Newark Plank Road & Ferry Co. v. Elmer*, 9 N.J. Eq. 754, 1855 WL 122,

at *20 (N.J. 1855); *see also Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 1870 WL 5140, at *8 (N.J. 1870) ("That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied."); *Dutton v. Strong*, 66 U.S. (1 Black) 23, 30 (1861) (adjudicating claim "that the bridge pier was a nuisance, because . . . it was an obstruction to the public right of navigation"). The second limitation recognized the sovereign's ability to impose restrictions on the building of wharves and other structures. *See, e.g., Bailey*, 112 A.2d at 13. That was New Jersey's own public policy from the mid-nineteenth century onward, when it began through statutory law the process of limiting what wharves and other riparian structures a landowner could erect. *See* 1851 N.J. Laws 335 (Wharf Act); N.J. Stat. Ann. §§ 12:3-1 to 12:3-25 (1979) (cited sections originally enacted prior to 1905); NJ Br. 8.

It is axiomatic that, if New Jersey could exercise *its* sovereign prerogatives over the tidal shorelands from the boundary of the Crown Landing project to the Delaware border, Delaware too could exercise its sovereignty over those aspects of the industrial facility that BP seeks to place on Delaware's submerged lands. As the New Jersey courts have recognized, "a riparian owner has no rights at common law, except alluvion and dereliction,[26] in such waters or the lands under them, beyond those of the public generally, even including unimpaired access thereto, merely by reason of his ownership of the ripa." *Bailey*, 112 A.2d at 13 (citing *Bouquet v. Hackensack Water Co.*, 101 A. 379 (N.J. 1917)). Rather, by local common law, a riparian owner could "appropriate such lands between the high and low water marks in front of his property as his own by wharfing out and filling in," but in doing so "[s]uch local custom was nothing more than a license, which,

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[26] "Alluvion" and "dereliction" refer to the gaining and losing of land as a result of the natural processes of tides, river flow, and sea movements. A riparian landowner would have certain rights to protect the land against such additions and subtractions.

when executed, became irrevocable." *Id.* Therefore, the State as owner of the submerged lands "could do what it pleased with its lands under tidewater as far as the adjoining riparian owner was concerned unless the latter had already exercised his privilege of wharfing or reclamation." *Id.* Because BP has not already erected its structure, it has no license to assert against either State.

Under the principles recognized in its own courts in the nineteenth century prior to enactment of the 1905 Compact, therefore, New Jersey plainly would have no claim that it has exclusive jurisdiction, to the exclusion of Delaware, to regulate any structures or activities on wharves that originate on the New Jersey shore but extend onto Delaware lands. Accordingly, the only question here is whether the 1905 Compact changed that baseline rule of sovereignty such that Delaware was ousted of jurisdiction to regulate hazardous activities occurring on those wharves in Delaware waters.

B. The 1905 Compact Did Not Alter Delaware's Authority To Regulate Structures Built On Its Subaqueous Lands

A congressionally sanctioned interstate compact is a federal law subject to federal construction. "Just as if a court were addressing a federal statute, then, the first and last order of business of a court addressing an approved interstate compact is interpreting the compact." *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (internal quotation marks omitted). "[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823). The Court will explore "textual reasons" for compact terms and examine the structure and the entirety of an agreement to evaluate the reasonableness of an interpretation of one portion. *Cuyler v. Adams*, 449 U.S. 433, 446-47 (1981).

Only if the text of the compact is ambiguous will the Court consider extrinsic evidence, including the course of

negotiations, course of performance, or other post-execution history. *See, e.g., Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991) ("[A] congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous. . . . Thus, resort to extrinsic evidence of the compact negotiations in this case is entirely appropriate."); *see also O'Connor v. United States*, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning.").

In evaluating a question of competing claims between sovereigns, moreover, the rule is that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) (holding that grant of title by federal government of subaqueous lands to Indian tribe withheld federal government's navigational easement).[27] New Jersey has likewise required "conclusive proof" of any purported relinquishment of property rights in lands owned by the State. *Stevens*, 1870 WL 5140, at *10 ("The claim is, that the legislature

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[27] *See also Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837) ("[W]henever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."); *id.* (Baldwin, J., concurring) ("[t]he rule that public grants pass nothing by implications, has been most rigidly enforced as to all grants of toll for ferries, bridges, wharves, quays, on navigable rivers and arms of the sea"), *reprinted in* WESTLAW, beginning at page 113 of the computer version of the Court's opinion, with the following notation: "**West Editorial Note:** the source of the following opinion is Baldwin's Constitutional Views, p. 134-169" (Justice Baldwin's concurring opinion apparently was not printed in the Peters Reports of this Court's decision in *Proprietors of Charles River Bridge* or subsequently in the U.S. Reports); *Harris v. Elliott*, 35 U.S. (10 Pet.) 25, 54 (1836) (giving a "strict, legal, technical interpretation" to purchase of land by United States for a navy yard in Charlestown, with the assent of Massachusetts).

has granted to these defendants the use of a part of the public domain. The state is never presumed to have parted with any part of its property, in the absence of conclusive proof of an intention to do so.").

Furthermore, it is common ground that the 1905 Compact was negotiated in the shadow of the then-unresolved boundary dispute. *See* NJ Br. 6 ("[t]he Compact did not establish the boundary line"). An interstate compact reached in the context of an unresolved boundary dispute must be "read . . . in light of the ongoing dispute over sovereignty." *Virginia v. Maryland*, 540 U.S. at 69. The drafters of the 1905 Compact would have understood that, absent some different provision, a subsequent adjudication of the boundary dispute would necessarily settle the boundary to which each State could exercise its "riparian jurisdiction."[28] Thus, the Court should construe the plain language of the Compact in that light.

1. Use of "continue" indicates that the States intended to maintain the status quo

The dispute before the Court turns primarily on the proper interpretation of Articles VII and VIII of the 1905 Compact. Article VII provides:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

NJ App. 5a. Article VIII then makes clear that nothing more than "riparian jurisdiction" was given in Article VII:

> Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of

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[28] "Riparian jurisdiction" appears not to be a term of art with an understood meaning at common law or as defined in state statutes.

> the subaqueous soil thereof, except as herein expressly set forth.

Id.

By its plain terms, Article VII provides in pertinent part that "[e]ach State may, on its own side of the river, *continue* to exercise riparian jurisdiction of every kind and nature." *Id.* (emphasis added). "Continue" means "to remain in a given place or condition." *Webster's International Dictionary* 314 (1898). By use of this verb, therefore, the parties clearly intended to carry on exercising the same principles with respect to riparian rights as they had before.

New Jersey draws a different conclusion from this plain meaning, however. New Jersey finds "critical importance" in Article VII's use of the word "continue," claiming that "it shows that the States intended that their riparian *sovereignty* could carry on in the same manner as had been exercised in the past." Br. 25 (emphasis added). In conjunction with that legal assertion, New Jersey adds the alleged fact that prior to 1905 it had on eight occasions authorized riparian structures extending beyond the low-water mark. *See* Br. 25-26 (citing NJ App. 29a-36a (Castagna Aff. ¶ 8)).

That "course-of-dealing" evidence, however, does not advance New Jersey's argument in light of that State's acknowledgment that the Compact was drafted against the backdrop of an ongoing boundary dispute. Whatever course of dealing had occurred before became irrelevant under the Compact's express provision that, going forward, the States agreed that they would exercise jurisdiction only on their "own side of the [illegible]r." NJ App. 5a. As the drafters of the Compact well knew, the boundary between the States had long been in dispute. In fact, when this Court eventually adjudicated the boundary dispute in 1934, it rejected a similar argument by which New Jersey claimed title to the middle of the river by virtue of the very same riparian improvements on which it relies here, claiming that Delaware had acquiesced in those im-

provements. The Court concluded, however, that "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them," and held that "[a]cquiescence is not compatible with a century of conflict." *New Jersey v. Delaware*, 291 U.S. at 376-77.

Article VII of the Compact simply provides that each State may "continue" to exercise riparian jurisdiction "on its own side of the river." It does not say that either State can do so beyond that boundary line, wherever it might later be adjudicated to lie. Thus, even if prior to 1905 New Jersey might have regulated riparian improvements on certain sites appurtenant to its shores that proved to be beyond the boundary adjudicated by this Court nearly 30 years later, the Compact in no way confers jurisdiction on New Jersey to regulate exclusively any *new* riparian structures extending from New Jersey's "own side of the river" into Delaware territory. New Jersey's apparently contrary construction of "continue" conflicts with the plain meaning of the word and the intent of the parties in deferring resolution of the precise boundary line.

Indeed, then as now, New Jersey's riparian laws expressly limited such transfers of rights to "lands of the state" — not lands of an adjacent State. N.J. Stat. Ann. §§ 12:3-9 (enacted 1877), 12:3-18 (enacted 1877), 12:3-21 (enacted 1891), 12:3-22 (enacted 1891), 12:3-23 (enacted 1891), 12:3-24 (enacted 1891), 12:3-25 (enacted 1891). Thus, New Jersey plainly could not "continue" to exercise the rights of a landowner with respect to land it has never owned. And no language in Article VII supports an argument that Delaware gave up its sovereign right to grant, lease, or convey its own titled lands.

2. Use of "on its own side" indicates that the States intended to preserve existing rights pending the outcome of the boundary dispute

Delaware's position that the 1905 Compact did not result in a transfer of sovereign rights to New Jersey is for-

tified by the Compact's reference to each party's exercise of jurisdiction on its "own side of the river." NJ App. 5a. By deferring resolution of the precise boundary coordinates, the States adopted non-specific language in Article VII — "own side of the river" — as a means of ensuring that, whenever the boundary dispute ultimately was resolved, the two States would know their respective rights and powers on their own side of the boundary. In 1905, the parties knew that "almost from the beginning of statehood Delaware and New Jersey ha[d] been engaged in a dispute as to the boundary between them," *New Jersey v. Delaware*, 291 U.S. at 376, so it would be illogical to read Article VII as giving up Delaware's right to assert its jurisdiction, including riparian jurisdiction, over land within its borders, wherever the boundary may ultimately be defined.

This Court's ruling in *Virginia v. Maryland* is instructive here. Virginia and Maryland had entered into a 1785 Compact at a time when the boundary between those States was in dispute and would not be resolved until 1877, when a binding arbitration award set the boundary at the low-water mark on the Virginia shore of the Potomac River. *See* 540 U.S. at 60-62; *id.* at 62 ("Although the 1785 Compact resolved many important navigational and jurisdictional issues, it did not determine the boundary line between the States, an issue that was left open to long continued disputes.") (internal quotation marks and ellipsis omitted). The 1785 Compact provided that "'[t]he citizens of each state respectively shall have full property in the shores of the Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.'" *Id.* at 66 (quoting Article Seventh of the 1785 Compact). Examining the various provisions of that compact, the Court observed that the provision in Article Seventh of a "privilege of making" wharves by the "citizens of each state" "was not explicitly

subjected to any sovereign regulatory authority," while the fishing right in Article Eighth "was subjected to mutually agreed-upon regulation." *Id.* at 66-67. The Court found "that these differing approaches to rights" "indicate that the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of another." *Id.* at 67.

By limiting each State's jurisdiction to its "own side of the river," the drafters of the Compact did not authorize one State, such as New Jersey, to determine how the other State's submerged lands would be utilized. Sovereign jurisdiction stopped at the boundary line and went no further.

Buttressing this point is the fact that the drafters of the Compact resolved their fishing dispute by reference to specific geographic lines that would not change regardless of how the boundary dispute might someday be resolved:

> Art. III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river *between low-water marks* on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

NJ App. 3a-4a (emphasis added). The specific geography denoted by the phrase "between low-water marks" is in stark contrast to Article VII's non-specific geographic phrase "own side of the river." The parties thus knew how to take a dispute over the right to use the Delaware River out of the shadow of the underlying boundary dispute, yet they plainly did not do so in Article VII.

Articles I and II, which likewise specify precise geographic lines, further show that Article VII was dependent on the future resolution of the then-unresolved boundary dispute. First, similar to Article III, Articles I and II permit each State to serve criminal and civil proc-

ess "from low-water mark on the New Jersey shore to low-water mark on the Delaware shore." NJ App. 2a-3a (Article I); *see also id.* at 3a (Article II). As with Article III, those precise geographic lines would apply regardless of the later resolution of the boundary dispute.

Second, Article I limits New Jersey's service of criminal process to offenses committed, among other things, "upon the *eastern half* of said Delaware River"; Article II correspondingly limits the criminal process that may be served by Delaware to offenses committed "upon the *western half* of said Delaware River." *Id.* at 2a-3a (emphases added). New Jersey's interpretation of Article VII would functionally rewrite the Compact by borrowing from other articles the specific language that it needs to give New Jersey "exclusive jurisdiction" (*id.* at 5a (Article IV)) "upon the eastern half of said Delaware River" (*id.* at 2a (Article I)). But Article VII does not contain that language. All it says is that each State has certain riparian rights "on its own side of the river." In view of the care with which the drafters expressly specified both exclusive jurisdiction and precise geographic boundary lines in other articles of the concise Compact (the substance of which spans less than four pages), it simply *cannot* be the case that Article VII grants New Jersey "exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline." NJ Br. 22.

Indeed, Article VIII of the Compact provides that "[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein *expressly* set forth." NJ App. 5a (emphasis added). Delaware's right to exercise its authority over structures on those lands can in no way be said to be "expressly" precluded by Article VII. The New Jersey Attorney General in 1954 recognized that basic point. In a Formal Opinion, he concluded that Article VIII leaves New Jersey powerless "to issue licenses for dredging within the twelve-mile Circle," which the Attorney Gen-

eral noted "New Jersey has never undertaken to issue." DE App. 72a (Formal Opinion 1954, No. 3, at 8 ("1954 Formal Opinion")). Moreover, he pointed out, "R. S. 1[2]:3-22 provides only for licenses to dredge or remove any deposits of sand or other material 'from lands of the state' under tide waters. The lands below low water mark within the twelve-mile Circle are not lands of this State, but lands of the State of Delaware." *Id.*[29]

The dredging proposed by BP here, moreover, is no small or incidental matter. It is inconceivable that Delaware would have ceded the authority to regulate the use and dredging of its subaqueous soil 2,000 feet out into Delaware waters in an area spanning 27 acres and requiring removal of the equivalent of 67,000 to 80,000 dump trunks worth of soil.

3. Nothing in the 1905 Compact diminished Delaware's pre-existing authority over its subaqueous lands

The 1905 Compact does not contain any provision evincing the requisite intent to cede Delaware subaqueous lands to New Jersey or otherwise to impair Delaware's public trust responsibility to manage those lands for the public good. Those omissions are fatal to New Jersey's argument, because a strong presumption exists that even a grant of submerged lands does not terminate the public trust. *See, e.g., Illinois Central*, 146 U.S. at 453; *see also Coeur d'Alene Tribe*, 521 U.S. at 284 (noting the "strong presumption" that state ownership of navigable waters "uniquely implicate[s] sovereign interests"); *supra* p. 37.

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[29] The opinion also concluded that "New Jersey has by virtue of Article VII the complete and exclusive right to make grants and leases of riparian lands below low water mark on its side of the river." DE App. 70a (1954 Formal Opinion at 7). That conclusion is incorrect for all the reasons stated in this brief, and is in serious if not irreconcilable tension with the Attorney General's conclusion that New Jersey could not authorize dredging on Delaware's subaqueous lands because they are not "lands of the state" of New Jersey. *Id.* at 72a-73a (1954 Formal Opinion at 8).

New Jersey itself acknowledges, moreover, that its exercise of "riparian jurisdiction" to regulate riparian rights is separate and apart from the State's jurisdiction to regulate based on environmental or conservation concerns. As one of its affiants explains, "[r]iparian owners, once they have a grant or lease, may dredge out from the area of their grant in order to reach the navigable channel. N.J. Stat. Ann. § 12:3-21 (enacted 1891.) *The exercise of this right is subject to obtaining applicable State environmental permits and a tidelands license.*" NJ App. 28a (Castagna Aff. ¶ 4) (emphasis added).[30] Indeed, one of the riparian grants to build a wharf on which New Jersey relies (at 26) states that "nothing in this act shall affect the rights of the State to lands lying under water," 1871 N.J. Laws ch. 307, § 1, thus making clear that a riparian grant does not obviate the exercise of other forms of jurisdiction.

Accordingly, New Jersey's grant of the right to use lands pursuant to its riparian jurisdiction would not prevent that State from exercising other forms of jurisdiction under other bodies of law to regulate conservation and the environment. Thus, even if New Jersey were correct that Article VII gave it "exclusive riparian jurisdiction" to decide the placement of wharves extending from the New Jersey shore into Delaware waters, NJ Br. 1, that term cannot be read so expansively as to preclude Delaware from exercising jurisdiction under its coastal zone laws, just as New Jersey's issuance of a riparian grant does not preclude it from enforcing its other generally applicable laws within that State.

In this case, Delaware strives to protect its fragile coastal zone. The purpose of the Delaware Coastal Zone Act is "to control the location, extent and type of industrial development in Delaware's coastal areas," because

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[30] The cited New Jersey statute was in place at the time the 1905 Compact was executed, and was codified under the heading of "Riparian Rights." *See* DE App. 167a (4 N.J. Comp. St., Riparian Rights § 36 (1911)).

those "coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State." Del. Code Ann. tit. 7, § 7001. In doing so, "the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism." *Id.* The Delaware legislature "further determined that offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy." *Id.* Thus, the Delaware Coastal Zone Act provides that "offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefor." *Id.* § 7003. The purpose of the Act is to regulate the environment, not regulate riparian rights, and even its provisions restricting bulk product transfer facilities do not apply solely to riparian owners. *See Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406-07 (3d Cir. 1987) (holding that the DCZA as applied to vessel-to-vessel transfers does not offend the dormant Commerce Clause); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246-47 (Del. 1985) (holding that vessel-to-vessel transfers fell within the definition of "bulk product transfer facilities" to advance the purposes of the DCZA).

Nothing in the phrase "riparian jurisdiction" can be read to preclude Delaware from exercising jurisdiction over its coastal zone environment. Indeed, the text of the Compact itself makes clear that the term "riparian jurisdiction" does not encompass the regulation of all activities that occur on or are attached to a wharf. In Articles I and II, the Compact sets out the rules for service of process and provides that neither State may serve process on a vessel that is "fastened to a wharf adjoining" the other State. NJ App. 3a. Plainly, if "riparian jurisdiction" encompassed the regulation of all activities that happen to

take place on or in connection with a wharf, this language would be surplusage. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2002) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted). Such a reading is especially to be avoided here, where the applicable interpretive rules counsel that language claimed to accomplish the relinquishment of any element of sovereignty or a State's public trust duties must be construed narrowly.

C. New Jersey's Arguments For "Exclusive" Riparian Jurisdiction Are Unpersuasive

1. The States intentionally did not confer "exclusive" authority with respect to riparian rights

Notwithstanding New Jersey's frequent assertion that the 1905 Compact conferred "exclusive State riparian jurisdiction" -- including in the Question Presented (Br. i) -- the word "exclusive" does not appear at all in Article VII's treatment of riparian rights. That omission is noteworthy, because elsewhere in the Compact the drafters *did* use the word "exclusive," and they did so when they wanted to confer such authority on the States.

Article III, for example, gives the inhabitants of Delaware and New Jersey "a common right of fishery." NJ App. 3a. Article IV then provides for the future drafting of concurrent state fishing laws, and holds that "[e]ach State shall have and exercise *exclusive jurisdiction* within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for." *Id.* at 5a (emphasis added). If, as New Jersey claims, the drafters intended in Article VII to give New Jersey "exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline" (Br. 22), then it is hard to understand why the drafters did not simply use the phrase "exclusive jurisdiction," as they did in Article IV. Construing the Compact as a fed-

eral statute, the governing principle is that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see also Norfolk & N.B. Hosiery Co. v. Arnold*, 45 A. 608, 609 (N.J. 1900) ("The express reservation of an election in the latter clause excludes the inference of such reservation in the former. If an option was to obtain in both instances, the parties knew how to express it, and would have used language appropriate to secure it.").

The omission of "exclusive" in Article VII of the 1905 Compact is all the more striking because New Jersey had prior drafting experience with an interstate compact that gave it such rights with respect to certain riparian appurtenances. In the 1834 Compact between New Jersey and New York, the parties provided with respect to the Hudson River that "[t]he state of New York shall have and enjoy *exclusive* jurisdiction of and over all the waters . . . of [the] Hudson River . . . to the low water-mark on the westerly or New Jersey side thereof," "subject to" a proviso that "[t]he state of New Jersey shall have the *exclusive* jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York." Act of June 28, 1834, ch. 126, 4 Stat. 708, 709-10 (Article Third) (emphasis added). In that compact — with which the drafters of the 1905 Compact surely were familiar[31] — New Jersey took care to establish its "exclusive

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[31] Articles I and II of the 1905 Compact at issue here, which concern service of process, are largely identical to Articles Sixth and Seventh of the 1834 Compact between New Jersey and New York.

jurisdiction" over wharves, while the 1905 Compact with Delaware speaks only of "riparian jurisdiction" without any mention of one State's exclusive authority at the expense of the other. Thus, nowhere in the Compact does Delaware convey to New Jersey "exclusive" riparian jurisdiction over structures on Delaware soil.

2. The meaning of "riparian jurisdiction" cannot extend beyond the State's boundary

New Jersey claims that the Article VII phrase "'riparian jurisdiction' connotes State sovereignty over riparian improvements." Br. 24. The State seems to be arguing that, if a riparian owner builds a structure that begins on the New Jersey side of the boundary and extends past it into the Delaware side, New Jersey has "riparian jurisdiction" to decide the placement of wharves extending from the New Jersey shore into Delaware waters. There are numerous flaws in that position. First, it reads the words "on its own side of the river" out of Article VII. If a State could exercise "riparian jurisdiction" as to structures no matter where they lay, so long as they extend from its shore, there would be no point in adding the exclusionary language "on its own side of the river" to Article VII. Second, New Jersey acknowledges that it "is not disputing the location of the boundary between the States, which this Court decided in 1934." NJ Br. 1. That concession is a tacit acknowledgment that the phrase "riparian jurisdiction" is not used in Article VII as a reference to a geographical place, but rather that "jurisdiction" denotes a reference to legal authority, *i.e.*, as a means of expressing New Jersey's authority to continue to act with respect to a specific, limited body of law known as riparian rights in whatever place the Compact permits.[32]

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[32] Nor is there merit to New Jersey's claim that Article VII would be meaningless if it did not give New Jersey riparian jurisdiction rights beyond the low-water mark. *See* NJ App. 29a (Castagna Aff. ¶ 6). That was fundamentally the position of the New Jersey Attorney General in a formal opinion on which the State here, curiously, does not rely. *See* DE App. 70a (1954 Formal Opinion at 7). Because the

New Jersey next argues that, because "a primary objective of riparian improvements is the ability to wharf out from the shore, beyond the low-water mark, as necessary to gain access to navigable waters," it follows that Delaware gave New Jersey the right to bar Delaware from exercising any sovereign rights within the twelve-mile circle if such exercise would in any way impact or "interfere with" any structure over which New Jersey seeks to exercise riparian jurisdiction. NJ Br. 24-25. As New Jersey necessarily concedes, however, the land under the river up *to the low-water mark on the New Jersey shore* belongs to Delaware. Both States have long recognized their sovereign right, acting in the public trust, to regulate such riparian improvements, including wharves, piers, and bulkheads. *See, e.g., Yates*, 77 U.S. (10 Wall.) at 504 (riparian proprietor has a "right to make a landing, wharf or pier . . . subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be"); NJ Br. 24-25 (citing Delaware and New Jersey cases). The question here therefore concerns which State (either or both) has *the right to regulate* such riparian improvements appurtenant to the New Jersey shore but extending into Delaware territory, and whether their jurisdiction to do so is exclusive or concurrent. Thus, the simple fact that riparian landowners (*i.e.*, those owning land abutting the shore) have long enjoyed a right to wharf out to navi-

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boundary had long been in dispute, the parties knew it might later be adjudicated to be at the low-water mark on the New Jersey shore (Delaware's position) or in the middle of the navigable channel (New Jersey's position). It thus made sense for the parties to make clear that they could "continue" what they had been doing with respect to riparian jurisdiction on each State's "own side of the river," wherever that boundary might subsequently be held to lie. Indeed, if the parties *really* had meant for New Jersey to have riparian jurisdiction *beyond* the low-water mark, then they surely would have said that, just as they delineated other rights in the Compact based on the low-water mark or another specific geographic designation, such as the western and eastern halves of the river. *See* NJ App. 2a-3a (Articles I, II).

gable waters subject to regulation by a state sovereign does not resolve the question *of which* state sovereign has that right in waters and subaqueous soil that indisputably belong to Delaware.

New Jersey likewise erroneously relies (at 25) on the *Article VII* phrase that each State's riparian jurisdiction is "of every kind and nature." NJ App. 5a. That is only so on New Jersey's "own side of the river," and the phrase "of every kind and nature" does not speak to where New Jersey's "own side of the river" might lie. To say that a State has full jurisdiction within its territory simply does not address whether it has any jurisdiction *outside* its territory. Moreover, "of every kind and nature" does not purport to extinguish pre-existing limitations on riparian rights, such as the inherent limit of a sovereign to regulate wharves or New Jersey's limitation prohibiting a riparian landowner from building structures on lands unless the landowner owned the subaqueous lands on which the structure was to be built.

3. New Jersey's invocation of other miscellaneous Compact provisions is unpersuasive

New Jersey next claims that Articles I and II reinforce its reading of the Compact because they "limit the States from asserting jurisdiction over wharves or docks attached to the other State by prohibiting the service of process by one State aboard a vessel attached to a pier or wharf on the banks of the other." Br. 26. New Jersey reads those Articles to "underscore[] the intent of the drafters to ensure that wharves and piers were subject solely to the jurisdiction of the State to whose riverbank they were attached." Br. 26-27. Articles I and II, however, concern service of process on persons found on a ship attached to a wharf, and not riparian rights to regulate the use of the wharf itself.

Indeed, the fact that the drafters were specific about certain rights on ships "fastened to a wharf adjoining" New Jersey (NJ App. 3a) shows that they knew how to be specific about wharves in the Compact — but in Article

VII they did not ground the respective States' riparian jurisdiction on a "wharf adjoining" New Jersey; instead, they limited jurisdiction to the States' "own side of the river." *Cf. Virginia v. Maryland*, 540 U.S. at 66 (compact expressly gave Virginia citizens "the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river").

4. New Jersey's argument that the States' "contemporaneous construction" of the Compact supports its exclusive jurisdiction has no merit

New Jersey's argument (at 30-33) that extrinsic evidence of the States' "contemporaneous construction" of the Compact since 1905 is also misplaced. Contrary to New Jersey's submission, since this Court resolved the boundary line within the twelve-mile circle, Delaware has consistently regulated structures that extend from the New Jersey side of the river into Delaware territory, under its statutes governing the use of subaqueous lands as well as the DCZA.

In 1961, Delaware adopted its first statute governing the leasing of subaqueous lands. *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966). In 1966, Delaware adopted a more comprehensive Underwater Lands Act containing provisions governing the lease of subaqueous lands by the State. *See* 55 Del. Laws ch. 442, § 1; Del. Code Ann. tit 7, §§ 6151-6159 (repealed 1986). In 1986, Delaware adopted its current Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72. Under these statutes, Delaware has exercised jurisdiction over subaqueous lands within the twelve-mile circle from 1961 to the present without objection from New Jersey, issuing at least 11 leases of Delaware subaqueous lands for projects that extend either from the New Jersey shore

or from the Delaware shore to the New Jersey shore. *See* DE App. 66a-68a (Maloney Aff. ¶¶ 3-14).[33]

For example, in 1962, Delaware executed a 20-year lease with the SunOlin Chemical Company for the construction and operation of underwater pipelines across the Delaware River. *See id.* at 66a (Maloney Aff. ¶ 4). On October 9, 1963, Delaware issued a 10-year subaqueous land lease to the Colonial Pipeline Company. *See id.* (Maloney Aff. ¶ 5). In 1971, Delaware granted a lease to E.I. du Pont de Nemours & Co. ("DuPont") to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers Works facility near the New Jersey shore. *See id.* at 67a (Maloney Aff. ¶ 6). In 1982, Delaware granted DuPont permission to repair and replace a 36-pile cluster near its Deepwater, New Jersey facility. *See id.* (Maloney Aff. ¶ 7). In 1987, Delaware issued leases to the Columbia Gas Transmission Corp. and the Colonial Pipeline Company for the construction of pipelines across the river. *See id.* (Maloney Aff. ¶¶ 8-9). In 1991, DNREC executed a 10-year subaqueous lands lease that allowed Keystone Cogeneration Systems to construct an unloading pier for a facility in Logan Township, New Jersey, and to dredge subaqueous soil within the twelve-mile circle; Delaware executed a 20-year renewal of that lease in 2001. *See id.* (Maloney Aff. ¶ 10).

In 1996, Delaware granted a lease to allow NJDEP to rehabilitate a pier and to construct a ferry dock on Delaware subaqueous soil near Fort Mott State Park in New Jersey. *See id.* at 67a-68a (Maloney Aff. ¶ 11). In 1997, Delaware issued a lease allowing Delmarva Power and Light Company to install fiber optic cable within the twelve-mile circle, extending from Pigeon Point in Delaware to Deepwater Point in New Jersey. *See id.* at 68a (Maloney Aff. ¶ 12). In May 2005, Delaware entered into

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[33] "Maloney Aff." refers to the Affidavit of Kevin P. Maloney, which can be found at DE App. 65a-68a

a lease allowing Fenwick Commons to fill Delaware subaqueous lands at the Penns Grove Riverfront and Pier, in Penns Grove, New Jersey. *See id.* (Maloney Aff. ¶ 14). It is therefore beyond dispute that Delaware has continuously — and, until very recently, without objection from New Jersey — regulated the use of its subaqueous lands in connection with projects that either extend from the New Jersey side of the river or extend from Delaware to the New Jersey shore.[34]

In addition to enforcing its subaqueous lands statutes, Delaware has consistently exercised jurisdiction over such projects under the DCZA following enactment of that statute in 1971. In 1972, Delaware issued a status determination under the DCZA to El Paso Eastern Company advising that its plan to build an LNG terminal extending from the New Jersey side of the river into the twelve-mile circle was prohibited. *See id.* at 8a-12a (Cherry Aff. Ex. A). By letter dated February 23, 1972, Delaware notified the Commissioner of NJDEP of the pending application and solicited comments. *See id.* at 74a (Letter from John Sherman, Planner III, Delaware Planning Office, to Richard Sullivan, Commissioner, NJDEP (Feb. 23, 1972)). By letter dated March 2, 1972, the New Jersey Commissioner responded that it would be useful to communicate on matters of joint interest, but expressed no objection to Delaware's jurisdiction over the application. *See id.* at 13a-14a (Cherry Aff. Ex. B). New Jersey's assertion that Delaware "did not actually block a project until 2005," NJ Br. 33, is thus incorrect.[35]

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[34] New Jersey's observation that in two instances private parties have questioned whether Delaware had authority to regulate within the twelve-mile circle, *see* Br. 15, 32-33, in no way undermines the conclusion that Delaware's course of performance has been to exercise its rights under the Compact. *Cf. New Jersey v. Delaware*, 291 U.S. at 375-77 (rejecting New Jersey's argument that wharf-building by its citizens acquired prescriptive rights in Delaware soils).

[35] New Jersey's failure to acknowledge that Delaware issued a status determination that the El Paso project was prohibited under the

In the late 1970s and 1980s, both Delaware and New Jersey officials further confirmed the applicability of the DCZA to projects entering Delaware from the New Jersey shore. On October 5, 1978, the Delaware Attorney General's Office issued Opinion No. 78-018, stating that the DCZA's exemption for docking facilities serving a single manufacturing facility would apply to docking facilities located in Delaware and serving a facility in New Jersey. *See* DE App. 77a. In August 1980, NJDEP submitted a final Environmental Impact Statement to the U.S. Department of Commerce that clearly acknowledged Delaware's authority to regulate projects extending into Delaware territory under its coastal management program. *See* NJDEP & NOAA, *New Jersey Coastal Management Program and Final Environmental Impact Statement* (Aug. 1980) ("Final EIS") (excerpted at DE App. 79a-83a). NJDEP stated that, because the relevant "Delaware – New Jersey State boundary" was "the mean low water line on the eastern (New Jersey) shore of the Delaware River," "[t]he New Jersey and Delaware Coastal Zone Management agencies . . . have concluded that any New Jersey project *extending beyond* mean low water must obtain coastal permits from both states." DE App. 82a (Final EIS at 20). NJDEP further explained that "New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." *Id.* at 82a-83a. Finally, with respect

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DCZA is particularly inexplicable because the CZICB specifically relied on that prior determination in refusing to authorize the Crown Landing project. *See* DE App. 60a (Cherry Aff. Ex. H (CZICB Decision and Order at 10)) (noting DNREC's argument that "the more relevant precedent, cited by several public speakers, is the 1972 denial of a permit to the El Paso Eastern Company for the construction of a pier in Delaware waters serving an LNG terminal in New Jersey"; noting that the El Paso project denial cited an analysis of the DCZA from the Delaware Attorney General; and finding that "a similar analysis applies to the proposed Crown Landing construction").

to the Crown Landing project itself, NJDEP's Office of Dredging and Sediment Technology advised BP on February 4, 2005, that "activities taking place from the mean low water line . . . outshore are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations." *Id.* at 85a (Letter from David Q. Risilia, ODST, to David Blaha, Environmental Resources Management (Feb. 4, 2005)).

Just as Delaware continued to regulate projects extending into its territory after this Court's 1934 decision, New Jersey continued to grant leases, licenses, or conveyances to private and governmental entities for riparian structures. New Jersey's activities, however, are in no way inconsistent with Delaware's jurisdiction over its territory within the twelve-mile circle. With the exception of the El Paso and Keystone facilities discussed above, as well as structures requiring licenses to dredge Delaware's subaqueous soil, those riparian projects did not necessitate Delaware's exercise of its authority under the DCZA or the subaqueous lands statutes. For example, Delaware did not object to New Jersey's issuance of permits for the Carney's Point project, the Keystone project, the Fort Mott project, or the two Pennsville Township projects (which involved de minimis extensions of 30 feet and 9 feet into Delaware territory). *See* NJ App. 70a-72a (Broderick Aff. ¶¶ 11-16). Unlike the Crown Landing project, those projects either did not implicate Delaware concerns or were otherwise regulated by Delaware.

Since this Court's 1934 boundary determination, New Jersey has also taken regulatory actions with respect to water intake and discharge that did not interfere with Delaware's jurisdiction and interests, and therefore provoked no protest from Delaware. For example, Delaware did not oppose New Jersey's issuance of permits regarding discharge of water within the twelve-mile circle because such permits are already subject to federal standards and are monitored by the Delaware River and Bay Commission, of which Delaware is a member. *See* DE App. 63a-

64a (Hansen Aff. ¶¶ 2-5)[36] (explaining that both EPA and the Delaware River Basin Compact require New Jersey to satisfy Delaware water-quality standards, eliminating the need for Delaware to issue separate permits). Delaware did not object to New Jersey's issuance of permits relating to water withdrawal at the Keystone project, *see* NJ App. 64a (Sickels Aff. ¶ 8), in large part because Delaware has a say in such permits through the approval and modification process of the Delaware River and Bay Commission. *See* Del. Code Ann. tit. 7, § 6501 (Art. 10, § 10.1) ("[t]he Commission may regulate and control withdrawals and diversions from surface waters and ground waters of the basin").

In the face of Delaware's consistent and substantial exercises of jurisdiction over wharves and other structures appurtenant to New Jersey that extend into Delaware, New Jersey relies on two New Jersey cases that it claims demonstrate that New Jersey acted "under the 1905 Compact to regulate activities occurring on riparian structures." Br. 31. In *State v. Federanko*, 139 A.2d 20 (N.J. 1958), however, the New Jersey court simply purported to apply Article I of the Compact in holding that "ownership of subaqueous soil by one state does not stand in the way of an agreement with its neighbor on the other side for a sharing of the criminal jurisdiction over the river." *Id.* at 33; *see id.* at 36 ("administering the criminal law on the easterly half of the river for the full frontage of Salem County as our State had solemnly agreed with Delaware to do"). The New Jersey court neither cited nor suggested it was acting pursuant to Article VII. In the other case relied on by New Jersey (at 31), the court interpreted Article VII to permit New Jersey to tax a wharf in the twelve-mile circle, but that lone example, in a New Jersey case where Delaware was not a party, in no way bears on Delaware's course of performance under the Compact.

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[36] "Hansen Aff." refers to the Affidavit of R. Peder Hansen, which can be found at DE App. 62a-64a.

See Main Assocs., Inc. v. B. & R. Enters., Inc., 181 A.2d 541, 543-45 (N.J. Super. Ct. Ch. Div. 1962).

New Jersey's reliance on the Delaware State Highway Department's 1957 "resolution" disavowing jurisdiction over a proposed project by Dupont, *see* Br. 31-32, is also misplaced. First, a letter by the Highway Department's outside counsel, Samuel Arsht, simply concurring in DuPont's counsel's interpretation of the 1905 Compact (without any indication that either attorney was aware of the 1954 Formal Opinion of the New Jersey Attorney General directly contrary to DuPont's counsel's interpretation) in no way binds Delaware or other Delaware agencies to that interpretation.[37] Second, the Highway Department did not adopt its outside lawyer's interpretation of the Compact or express a view that Delaware lacked authority to regulate projects extending from the New Jersey shore into Delaware territory. On the contrary, the Highway Department merely stated that, "taking cognizance of" its lawyer's opinion, it would advise the Corps that "the Department has no jurisdiction over the area mentioned." NJ App. 109a-110a (Donlon Aff. Ex. G).

The Highway Department did not conclude that *Delaware* lacked jurisdiction to regulate within the twelve-mile circle or that the 1905 Compact stripped Delaware of authority over projects originating on the New Jersey side of the river. Even if it had, the Department's conclusion would not bind the State or other Delaware agencies. The Delaware legislature's decision in 1961 to regulate Delaware subaqueous lands after Arsht opined that Delaware

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[37] Arsht was a private lawyer with the firm of Morris, Steel, Nichols & Arsht at the time he was Counsel to the Delaware State Highway Department. *See* NJ App. 109a-110a. Moreover, even if Arsht had been an agent of Delaware, neither the State nor any of its agencies had conferred on him the authority to issue binding interpretations of the Compact. *Cf. Lee v. Munroe*, 11 U.S. (7 Cranch) 366, 369 (1813) (holding that the government is not bound by mistaken representations of an agent unless it is clear that the representations were within the scope of the agent's authority).

lacked jurisdiction to do so within the twelve-mile circle indicates that the legislature did not share Arsht's incorrect view of Delaware's authority. *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966). Finally, the 1957 Highway Department resolution preceded passage of Delaware's Underwater Lands Act adopted in 1966 and the DCZA in 1971. The resolution thus carries no weight in evaluating Delaware's course of performance in enforcing its subaqueous lands statutes and its coastal management program against projects that extend from the New Jersey shore into Delaware territory.

5. New Jersey's reliance on Delaware's alleged "concessions" in the 1934 boundary case is misplaced

New Jersey claims that, in the course of litigating the boundary case nearly 30 years after entry of the 1905 Compact, private counsel retained by Delaware "conceded both the right of New Jersey citizens to wharf out to navigable water and the exclusive right of New Jersey to regulate the exercise of those rights." Br. 27-28; *see id.* at 27-30. As shown above, however, the plain language of the Compact cannot be read to give New Jersey exclusive riparian jurisdiction in Delaware waters. Moreover, New Jersey's reliance on counsel's statements is misplaced for several reasons and in any event cannot fairly bind Delaware in the context of the issues presented in this case.

First, the scope of riparian jurisdiction in Article VII of the Compact was not at issue in the boundary case. Rather, New Jersey argued that the Compact had transferred *title* of the eastern half of the river from Delaware to New Jersey. This Court rejected that argument out of hand, explaining that "[t]he compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go." *New Jersey v. Delaware*, 291 U.S. at 377-78. Thus, the Court plainly held that nothing in the Compact transferred title of any Delaware lands to New Jersey. The

Court's opinion did *not*, however, interpret the scope of Article VII's "riparian jurisdiction."

Second, in one of the statements on which New Jersey relies, counsel made quite clear that Delaware was arguing in the alternative: "'*Even if* the Compact of 1905 be construed as ceding to the State of New Jersey the right to determine to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way.'" NJ Br. 30 (quoting NJ App. 237a) (emphases added and deleted). Delaware simply made the point that, "even if" the Compact gave New Jersey riparian jurisdiction (whether exclusive or concurrent) over wharves extending from New Jersey into Delaware, the Compact did not support New Jersey's claim to title to Delaware soil. *See* NJ App. 183a (Delaware Reply Brief to Special Master) ("The conclusion . . . is that the exercise of riparian rights by the inhabitants of the Province of New Jersey was not in any sense hostile or adverse to the ownership of the soil by William Penn.")

New Jersey further seeks to exploit a statement by Delaware's counsel that "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights." *Id.* at 186a. But New Jersey makes too much of that statement, for the very next sentence of the brief stresses Delaware's ultimate ownership (and therefore control) of the subaqueous lands on which such riparian rights might be exercised: "That the Compact of 1905 left the title to the subaqueous soil unaffected is clear from the express language of Article VIII." *Id.* Thus, understood in context, Delaware counsel was merely acknowledging that New Jersey could decide who could exercise riparian rights from the New Jersey shore, and that its regulations would apply to those structures even if they extended into Delaware lands. But, given the importance of title to a State's lands and the important inci-

dence of sovereignty over a State's submerged lands, which Delaware counsel repeatedly invoked throughout the litigation, counsel's statement cannot fairly be understood to mean that Delaware itself would *not* have any regulatory authority over riparian structures built on Delaware lands. At most, counsel's statement was a recognition of the obvious principle that, where a structure traverses two States, both have regulatory jurisdiction with respect to those parts of the structure within the State's boundary. *See, e.g., McGowan v. Columbia River Packers' Ass'n*, 245 U.S. 352, 357-58 (1917) (holding that State cannot remove structure on neighboring State's submerged lands in navigable river that forms boundary between the two States).

Finally, to the extent this Court perceives any tension between Delaware's position today and in certain isolated statements from the boundary case, Delaware should not be taken to have conceded an issue that was not presented to the Court for adjudication.[38] The Court's opinion in the boundary case in no way relied on and did not rule on any arguments concerning the scope of Article VII's riparian jurisdiction. *Cf. New Hampshire v. Maine*, 532 U.S. at 751 (applying judicial estoppel because "interpretation of the words 'Middle of the River' . . . was 'necessary' to fixing the . . . boundary" in the prior litigation).[39]

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[38] New Jersey presumably intends to claim judicial estoppel. That doctrine, however, is inapplicable where the party's statement was not relied on by the Court to rule in that party's favor. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations." *Id.* (internal quotation marks omitted).

[39] The special master's report adopted by the Court, *see New Jersey v. Delaware*, 295 U.S. 694, 694 (1935), found that "[b]y the Compact of 1905 between the States of New Jersey and Delaware the State of Delaware recognized the rights of riparian owners to wharf out on the easterly side of the Delaware River within the twelve-mile circle. By said Compact the State of Delaware did not convey to the State of New Jersey title to any part of the Delaware River or to any part of the subaqueous soil thereof, and said Compact did not in anywise alter or

Application of any estoppel principle would be particularly inappropriate here, given that counsel's arguments are not "clearly inconsistent with its earlier position." *Id.* at 750 (internal quotation marks omitted). Here, the conditional nature of Delaware's statements undercuts New Jersey's assertion that Delaware could concede an issue that was in no way necessary to resolution of the boundary dispute. Nor is there any "unfair advantage" in permitting Delaware to litigate an issue not decided by the Court in the boundary case. *Id.* at 751.[40]

Any application of judicial estoppel here would be especially unwarranted given that the lands implicated by New Jersey's attempt here to exercise "exclusive" riparian jurisdiction involve public lands held in trust by Delaware for its citizens. As this Court has explained, "'broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests.'" *New Hampshire v. Maine*, 532 U.S. at 755 (quoting 18 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 4477, at 784 (1981)).

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affect the boundaries of the respective states." NJ App. 256a; *see also* NJ Br. 28. Thus, as the report states, its reference to the scope of the Compact was not necessary to resolving the disputed boundary issue. *See Bennis v. Michigan*, 516 U.S. 442, 450 (1996) ("[I]t is to the holdings of our cases, rather than their dicta, that we must attend.") (internal quotation marks omitted); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995) ("Breath spent repeating dicta does not infuse it with life."). In any case, the special master did *not* find that New Jersey's Article VII riparian jurisdiction was exclusive, as New Jersey must have it in order to prevail.

[40] Finally, this Court has recognized that "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *New Hampshire v. Maine*, 532 U.S. at 753 (internal quotation marks omitted). The Delaware statements cited by New Jersey are not accompanied by any textual analysis of the Compact. *Cf. supra* pp. 45-56. Indeed, the private counsel representing Delaware in the boundary case couched one statement as being merely "'in my view,'" NJ Br. 28 (quoting NJ App. 191a), and thus should not be deemed to be the considered interpretation of the State of Delaware.

Thus, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).[41]

D. *Virginia v. Maryland* Does Not Deny Delaware The Right To Exercise Its Coastal Zone Laws And To Reject A Structure Built On Delaware Subaqueous Lands

New Jersey (at 27) cites *Virginia v. Maryland* for the proposition that Article VII should be read to grant New Jersey the exclusive authority over BP's project that it claims. Although that case may appear to share some surface similarities with this one, at root it raises fundamentally different concerns and involves different legal principles.

The case arose out of Maryland's ownership of the bed of the Potomac River to the low-water mark on the Virginia side. In 1996, Fairfax County, Virginia, applied to Maryland for a permit to withdraw water from the river. Several Maryland officials objected because the water would divert economic growth and development from Maryland to Virginia. Maryland initially denied the permit on the ground that the county had not demonstrated a sufficient need for the water, but in 2001 it approved the permit. However, the Maryland legislature placed a limit on the amount of water that could be withdrawn. Maryland therefore conceded Virginia's right to withdraw water but argued that its sovereignty over the bed

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[41] The Court found this principle inapplicable in *New Hampshire v. Maine*, because it found that "New Hampshire advances its new interpretation not to enforce its own laws within its borders, but to adjust the border itself." 532 U.S. at 756. Here, Delaware seeks to enforce its own laws within its own undisputed territory.

gave it the right to regulate the amount of Virginia's withdrawals.

In rejecting Maryland's position and upholding the right of Virginia to withdraw water for the use of its citizens, this Court held that a 1785 Compact gave Virginia immunity from Maryland sovereignty over a portion of the bed of the Potomac awarded to Maryland more than a century after the compact became law. The Court reasoned that the language in Article Seventh of the 1785 Compact gave the citizens of each State "full property in the shores of [the] Potowmack river adjoining their land, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements," 540 U.S. at 62, and therefore settled the issue at a time when the location of the boundary between the two States and thus control over the river was contested. Article IV of the subsequent boundary award gave Virginia "a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding navigation or otherwise interfering with the proper use of it by Maryland." *See id.* at 62-63. The Court held that Virginia gained the right "to use the River beyond low-water mark . . . *qua* sovereign." *Id.* at 72.

Virginia v. Maryland is readily distinguishable from New Jersey's present dispute with Delaware. Fundamentally, that case involved an application of the well-established principle of equitable apportionment, pursuant to which sovereigns on both sides of a shared river are permitted to draw out water for their citizens' use. That is a different legal regime from the public-trust doctrine, which vests special sovereign attributes in the submerged lands owned by a sovereign.

Even aside from that fundamental distinction, Article VII of the 1905 Compact is limited to a continuation of the exercise of "riparian jurisdiction" and does not involve the grant of ownership in submerged lands or a cession of any public trust responsibility with respect to those lands. By

contrast, the 1785 Maryland-Virginia Compact gives an unconditional right to wharf out. *See Virginia v. Maryland*, 540 U.S. at 62. Such a provision would have been consistent with the common law at the time when the right was only subject to the principle that a wharf not constitute a nuisance by interfering with navigation. Article VII of the 1905 Compact, however, is more limited because, by 1905, the right to wharf out was more contingent and subject to the additional limitations imposed by a sovereign if the wharf was not deemed to be in the public interest. *See supra* pp. 43-45.

Moreover, Maryland's objections to Virginia's use of the Potomac and the way Maryland tried to implement its objections raise serious legal issues not present in Delaware's denial of BP's request for a coastal zone permit. Nor did Maryland's objections have any connection to a legitimate interest of that State. Maryland initially asserted the right to control all of the water in the river for the benefit of its citizens. It then unilaterally decided Virginia's share of the river. At oral argument, however, Maryland conceded that Virginia's withdrawal pipe would have no adverse impact on Maryland or its residents. *See* Oral Arg. Tr., *Virginia v. Maryland*, No. 129, Orig., 2003 WL 22335915, at *11 (Oct. 7, 2003).

Maryland's actions also violated other bedrock principles of Federal law. Under the dormant Commerce Clause, a State may not withhold resources, including water, from interstate commerce, *see Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), or from a co-riparian state, *see Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024-25 (1983). Maryland violated the second principle by, in effect, unilaterally allocating the waters of the Potomac. That effort ran afoul of the three means recognized by this Court for allocating interstate waters: (1) an original equitable apportionment action in the Supreme Court, (2) an interstate compact, or a (3) congressional Act. Because none of those actions had occurred, the Court could have upheld Virginia's claim without deciding

that Maryland had surrendered its sovereign rights, and indeed suggested as much. *See* 540 U.S. at 74 n.9.

The third distinction between the two cases is that Delaware is not interfering with a recognized interest of New Jersey in the Delaware River as Maryland did in *Virginia v. Maryland*. There is an important difference between the use of water and the construction of enormous structures on the submerged lands of the river. This Court upheld Virginia's right to use the waters of the Potomac as a sovereign, a use well known in water law as a usufructory right. *See id.* at 72. That right, however, is distinct from ownership. The general rule is that no one can own the waters of a river; one can only obtain a lesser right to use them. Ultimately, *Virginia v. Maryland* was a "use" dispute, whereas New Jersey here has implicated Delaware's sovereign right to decide how the subaqueous lands that it indisputably owns should be utilized. New Jersey has no common law or federal constitutional right in Delaware's decision because that decision involves the control of Delaware territory. Any right, if one exists, must come from the 1905 Compact. As we have shown, no such right emanates from the plain language or purposes of that Compact.

III. APPOINTMENT OF A SPECIAL MASTER IS WARRANTED IF THE COURT TAKES JURISDICTION OVER THIS CASE BUT CANNOT RESOLVE IT SUMMARILY AGAINST NEW JERSEY

This Court routinely appoints a Special Master in cases involving disputes between two States about the meaning of an interstate compact or their respective rights to use the waters of an interstate waterway. *See, e.g., Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Maryland*, 540 U.S. 56 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991); *Texas v. New Mexico*, 482 U.S. 124 (1987); *see also Nebraska v. Wyoming*, 515 U.S. 1 (1995) (appointing a Special Master in a case brought by Nebraska to enforce a

1945 decree by this Court); Robert L. Stern, *et al.*, *Supreme Court Practice* § 10.12, at 576 (2002). This Court should follow the same procedure here, in the event that this Court takes jurisdiction over this case but cannot resolve it based on any of the substantive grounds presented above.

A Special Master would be best positioned to consider, in the first instance, the extensive historical evidence that each State could be expected to put forward. Delaware would submit historical evidence about each State's riparian rights within the twelve-mile circle under common law and applicable state statutes — as well as evidence of the historical exercise of those rights — prior to the 1905 Compact. Delaware would also seek to introduce historical evidence demonstrating each State's intent at the time it signed the Compact. And Delaware would put forward course-of-performance evidence from the 100 years that have passed since the signing of the Compact. Not only are these fact-finding duties best entrusted to a Special Master in the first instance, but a Special Master would be able to preside over the discovery process, as Delaware continues its efforts to gather historical materials in New Jersey's possession that pertain to these various issues.[42]

Without acknowledging this Court's normal practice of appointing a Special Master in cases comparable to this one or this Court's sound reasons for that practice, New

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[42] On August 25, 2005, Delaware's Attorney General, M. Jane Brady, made a preliminary request to New Jersey's Attorney General, Peter C. Harvey, for certain documents relating to the allegations in New Jersey's Motion to Reopen and Request for a Supplemental Decree. While New Jersey permitted counsel for Delaware to inspect certain public documents in September and October 2005, as late as the week of October 24, 2005, only days before Delaware's Brief in Opposition to New Jersey's Motion was due, New Jersey produced a significant amount of documents that Delaware has not had a reasonable opportunity to review prior to the deadline for filing its brief. Delaware, as a result, has not been able to complete its review of all of the relevant facts for this complicated historical proceeding that may be included in New Jersey's most recent production.

Jersey asserts that this Court ought not follow that practice here. *See* NJ Br. 33-34. But the few cases on which New Jersey relies are inapposite. As an initial matter, the Court's decision in *Virginia v. Maryland*, 540 U.S. 56 (2003), which was based on its review of a Special Master's report, supports the appointment of a Special Master here as well. Although New Jersey asserts (at 33-34) that *Virginia v. Maryland* "decided a similar legal issue" as the issue presented here, that case involved withdrawal of water from a river. *See, e.g.*, 540 U.S. at 63. Here, by contrast, New Jersey couches the construction of a massive bulk transfer facility 2,000-feet long and 50-feet wide, with the attendant dredging of 27 acres of Delaware land, as a separate riparian right "to wharf" out to navigable waters. Even if such a facility could be viewed simply as "wharfage," historically such rights have been subject to clear limitations on the uses to which such wharves can be put. *See supra* pp. 43-45.

In any event, this Court made clear that its decision in *Virginia v. Maryland* turned not on generally applicable legal principles, but instead on the specific terms of "Article Seventh of the 1785 Compact [between Virginia and Maryland] and Article Fourth of the Black-Jenkins Award," such that resolution of the dispute "obviously require[d] resort to those documents." 540 U.S. at 65-66. Because a different compact, with a different history and course of performance are at issue here, this Court's decision in *Virginia v. Maryland* provides no basis for dispensing with the appointment of a Special Master.

Furthermore, the circumstances here are decidedly unlike those in *California v. United States*, 457 U.S. 273 (1982), and *New Hampshire v. Maine*, 532 U.S. 742 (2001), where this Court did not appoint a Special Master. *See* NJ Br. 34. *California v. United States* involved a narrow "choice-of-law issue," as to which this Court found that "[n]o essential facts [were] in dispute." 457 U.S. at 278. But that is not the case here, where Delaware and New Jersey currently dispute a number of essential facts,

involving the historical exercise of riparian rights within the twelve-mile circle, the parties' intent in framing the 1905 Compact, and the inferences to be drawn from each State's course of performance since 1905. *New Hampshire v. Maine* is equally inapposite, as the Court found that it could "pretermit the States' competing historical claims" because New Hampshire was judicially estopped from disputing Maine's claim that a "1740 decree and [a] 1977 consent judgment divided the Piscataqua River at the middle of the main channel of navigation." 532 U.S. at 748. The Court could not avoid reaching the parties' historical disputes here on that same ground because, as shown above, no position taken by Delaware in prior litigation with New Jersey judicially estops Delaware from disputing New Jersey's claim of exclusive jurisdiction to govern the uses of structures built out onto land owned by Delaware within the twelve-mile circle. *See supra* pp. 68-71.

Given the complexity of the historical facts and the attendant legal principles, the Court likely would obtain substantial benefits from a Special Master's distillation of the issues and a recommendation on how this Court should resolve them.

CONCLUSION

For the foregoing reasons, this Court should dismiss New Jersey's pleading for lack of jurisdiction. If the Court takes jurisdiction over New Jersey's pleading, it should deny New Jersey's request for declaratory and injunctive relief because Delaware has the right, as a sovereign and under the 1905 Compact, to regulate the manner in which BP intends to construct a massive LNG bulk product transfer facility within Delaware's territory. If the Court finds that it cannot resolve this case against New Jersey based on the arguments presented herein, the Court should follow its customary practice and appoint a Special Master to hear evidence and make a recommendation on the resolution of this dispute.

Respectfully submitted,

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October 27, 2005

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APPENDIX 1 – AFFIDAVIT OF PHILIP CHERRY DATED OCTOBER 24, 2005

No. 11, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

AFFIDAVIT OF PHILIP CHERRY IN OPPOSITION OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

STATE OF DELAWARE :
: SS
COUNTY OF KENT :

Philip Cherry, being duly sworn, deposes and says:

1. I am the Director of Policy and Planning for the Delaware Department of Natural Resources and Environmental Control ("DNREC"), an agency of the State of Delaware. I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by DNREC.

2. From 1983 to 1990, I was employed by the Division of Water Resources of DNREC, initially as a geohydrolo-

gist and later as the manager of the Water Supply Branch. In 1990, I was promoted and served as the Pollution Prevention Program Director for DNREC until 1993. From 1993 to 1998, I served as an executive assistant to the Secretary of DNREC representing DNREC on legislative matters. In 1998, I left DNREC to act as a legislative liaison for then Governor (now Senator) Thomas Carper. In December 2000, I returned to DNREC to serve in my current position, Director of Policy and Planning.

3. As part of my responsibilities as Director of Policy and Planning for DNREC, I supervise the administration of the Delaware Coastal Zone Act. Del. Code Ann. tit. 7, § 7001 *et seq.* (herein, the "DCZA" or the "Act"). I report directly to the Secretary of DNREC on all DCZA issues and applications.

4. The DCZA, adopted in 1971, begins with a statement of legislative policy and purpose declaring that "the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State." Del. Code Ann. tit. 7, § 7001. Under the Act, the "declared public policy" of Delaware is "to control the location, extent and type of industrial development in Delaware's coastal areas." *Id.* The Act specifically finds that "offshore bulk transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy." For these reasons, the Act declares that an absolute "prohibition against bulk transfer facilities in the coastal zone is deemed imperative." *Id.* Section 7003, "uses absolutely prohibited in the coastal zone," implements this policy by providing that "offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited." Del. Code Ann. tit. 7, § 7003. Delaware's coastal zone consists of land, water, and subaqueous land within the territorial limits of Delaware in the Delaware River, including the water and subaqueous soil within a twelve-mile arc from the

town of New Castle, Delaware, which is known as the Twelve Mile Circle. Del. Code Ann. tit. 7, § 7002(a).

5. In December 1971, the El Paso Eastern Company ("El Paso") submitted a proposal to construct a liquefied natural gas ("LNG") terminal in New Jersey, opposite Claymont, Delaware, which also proposed extending a pier into Delaware territory within the Twelve Mile Circle. On February 23, 1972, the State Planner, then charged with administering the DCZA, issued a status decision rejecting El Paso's proposed LNG terminal as a prohibited use under the DCZA. Exhibit "A." The State Planner apprised New Jersey officials of El Paso's proposal and Delaware's application of the DCZA to the proposal. Delaware's files indicate that New Jersey expressed no objection to Delaware's application of the DCZA to the El Paso proposal. Exhibit "B."

6. In 1972, the Federal government adopted the Coastal Zone Management Act ("CZMA") pursuant to which coastal states were authorized to develop a Coastal Zone Management Plan. 16 U.S.C. § 1451 *et seq*. In 1979, the Office of Coastal Resource Management of the National Oceanic and Atmospheric Administration, within the U.S. Department of Commerce, approved Delaware's Coastal Zone Management Plan, which includes the DCZA, as part of Delaware's final Environmental Impact Statement under the Federal Coastal Zone Management Program. Delaware's Plan was updated and approved in 1995, 1998 and 2003. Delaware's Coastal Zone Management Plan states that there is no site in Delaware suitable for the location of any LNG import-export facility.

7. On July 13, 1990, Keystone Cogeneration Systems Inc. ("Keystone") (currently known as the Logan Generating Company) applied to DNREC for a status decision relating to its proposal to build a 200 megawatt coal-fueled cogeneration facility in Logan Township, New Jersey, including an 1,100 foot pier extending into Delaware waters. In a status decision issued November 19, 1990,

DNREC determined that the project did not constitute a prohibited bulk product transfer facility under the DCZA because it fell within a statutory exception for a single use industrial or manufacturing facility. Exhibit "C." However, DNREC required Keystone to satisfy the permitting requirements under the DCZA. A review of Delaware's files indicates that New Jersey did not object to Delaware's enforcement of the DCZA with respect to Keystone's project.

8. In 2002, representatives of British Petroleum, through its wholly owned indirect subsidiary, Crown Landing, LLC (herein, "BP") contacted DNREC regarding a proposal to construct an LNG terminal partially within Delaware waters. At that time, BP advised DNREC that the majority of the offshore unloading facility for the proposed project would be located in Delaware waters within the boundaries of New Castle County, Delaware. The related onshore facilities would be located in Logan Township, New Jersey. BP stated that approval under the DCZA would be required because the project is partially located in Delaware territory.

9. BP's representatives advised DNREC that one of the primary advantages of the proposed site is the proximity to natural gas transmission pipelines. BP, however, has alternate available sites where it could locate its proposed facility in the Delaware River outside Delaware's coastal zone (including sites in Logan Township, New Jersey, Greenwich Township, New Jersey, Paulsboro Borough, New Jersey, and West Deptford, New Jersey).

10. On September 27, 2004, BP submitted an application to DNREC for permission to perform approximately nineteen tests including geotechnical test borings in the Delaware River to gather information for the design of a receiving terminal to support the proposed LNG facility. Exhibit "D." On October 29, 2004, after public comments were received on BP's application for geotechnical test borings in the Delaware River, Laura M. Herr, the Pro-

gram Manager of DNREC's Wetland and Subaqueous Lands Section, advised BP that DNREC could not make a decision on the application until a determination was made on whether construction of an LNG facility is an activity permitted in Delaware's coastal zone. Exhibit "E." On November 4, 2004, BP withdrew its geotechnical test boring application. Exhibit "F."

11. On December 7, 2004, BP filed a request under the DCZA seeking a status decision by the Secretary of DNREC as to whether the proposed LNG facility would be a permitted use under the DCZA.

12. BP's request stated that the proposed LNG terminal docking facility would consist of a 2,000-foot-long pier and a single berth. The supertankers berthing at the docks would range from 914 to 1,056 feet in length and would transport from 138,000 to 200,000 cubic meters of LNG.

13. If BP's proposed LNG terminal were built, BP would be required to initially dredge 800,000 cubic yards of Delaware subaqueous land (approximately 27.4 acres) below the Delaware River to a depth of 40 feet below the mean water line to dock the supertankers. Thereafter, because of sedimentation, BP or others would be required to dredge of 60,000–90,000 cubic yards per year of Delaware's subaqueous land to enable the supertankers to navigate the Delaware River.

14. BP's proposed LNG terminal would include a docking facility that would extend 2,000 feet from the New Jersey shore into Delaware territory and would be 50 feet wide. The facility would also include a 6,000 square foot unloading platform in Delaware territory. The trestle is designed to provide structural support for cryogenic piping, a containment trough, and utility lines from shore to berth. The trestle will also accommodate two travel lanes for light vehicles. This pier would be supported on approximately 80 steel pilings, each three feet in diameter and 100-120 feet long which are anchored into the riverbed.

15. The proposed LNG terminal would be expected to receive two to three ships per week. These ships would navigate up the Delaware River, by the Salem Nuclear Power Plant, under the Delaware Memorial Bridge (a major interstate bridge that connects New Jersey and Delaware), and past densely populated areas of New Castle County, Delaware, including its largest city, Wilmington, and the towns of New Castle, Delaware City, and Claymont. These communities could be within a potential hazard area during the LNG supertanker transit.

16. When the proposed LNG supertankers are in transit, a moving safety and security zone would restrict other vessels 3,000 feet ahead and behind and 1,500 feet on all sides of the supertanker. When docked, a temporary hazard area would exist around the unloading facility during the period when the ship is at the dock. The LNG supertankers would be docked at the BP facility approximately 30 to 40 percent of each year.

17. In January of 2005, DNREC published notices inviting public comment on BP's request for a coastal zone status decision. Over 200 public comments were received, all but one urging rejection of the proposal.

18. On February 3, 2005, John A. Hughes, Secretary of DNREC, issued DNREC's status decision on BP's application. In the status decision, Secretary Hughes concluded that the proposed LNG terminal represents a prohibited bulk product transfer facility which is prohibited under the DCZA. Secretary Hughes also held that the proposed facility exhibits characteristics sufficient to deem it heavy industry, which is also prohibited under the DCZA. Exhibit "G."

19. On February 15, 2005, BP filed an appeal of the status decision, which was heard by Delaware's Coastal Zone Industrial Control Board (the "Board") on March 30, 2005. After extensive briefing and a public hearing, the Board issued a decision on April 14, 2005, unanimously affirming the Secretary's determination that BP's pro-

posed LNG terminal is a prohibited bulk transfer facility under the DCZA. Exhibit "H." The Board's decision holds that "the proposed construction is absolutely prohibited by the" DCZA and "no permit therefor may be issued." *Id.* at 10.

20. BP chose to not appeal this decision of the Board to Delaware's Superior Court, as permitted by the DCZA.

/s/ PHILIP CHERRY
Philip Cherry

Subscribed And Sworn To
Before Me This 24th Day
Of October, 2005

/s/ LAURIE MOYER
Notary Public
Of The State Of Delaware

[Notary Stamp omitted]

EXHIBIT A

STATE OF DELAWARE
EXECUTIVE DEPARTMENT
PLANNING OFFICE
DOVER

RUSSELL W. PETERSON
GOVERNOR

DAVID R. KEIFER
DIRECTOR

February 23, 1972

Mr. Barry Huntsinger
El Paso Eastern Company
2727 Allen Parkway
Houston, Texas 77019

Dear Mr. Huntsinger:

This is to inform you of my status decision regarding the El Paso Eastern Company proposed project for a pier within Delaware's jurisdiction in the Delaware River to serve as a tanker berthing facility in connection with a Liquified natural gas terminal near Penns Grove, New Jersey.

The status of the pier facility for this El Paso Eastern Company project is that it is an offshore bulk product transfer facility which is prohibited in the Delaware coastal zone by the terms of Section 7003 of the Coastal Zone Act (Chapter 70, Title 7, Delaware Code). No coastal zone permit may be issued for such a use. This opinion is based on the advice of Attorney General Stabler and my examination of the descriptive material provided in your letter of December 21, 1971.

If you wish to file an appeal from this decision it should be filed within fourteen (14) days of your receipt of this notice on the appeal form provided herein. Items A, B, and E on the appeal form should be filled in, as well as the date of the appeal application. At this time there is no

appeal fee required. The appeal should be sent to the State Coastal Zone Industrial Control Board at the address shown on the appeal application form.

If you have any questions, please contact me.

Sincerely,

/s/ DAVID R. KEIFER
David R. Keifer
Director

DRK/daf

Enclosure

CC: Secretary Austin N. Heller
Commissioner Richard Sullivan

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Wilmington, Delaware

W. LAIRD STABLER, JR.
ATTORNEY GENERAL

January 20, 1972

Mr. David R. Keifer, Director
Planning Office
Executive Department
State of Delaware
Dover, Delaware 19901

Re: Coastal Zone Act – Bulk Transfer Facility
(El Paso Eastern Company)

Dear Dave:

I have reviewed the material submitted to you with regard to the liquid natural gas (LNG) terminal which El Paso Eastern Company proposes to built in New Jersey with docking facilities extending into the Delaware River. I agree with your determination that this facility is an offshore bulk product transfer facility as that term is defined by the Coastal Zone Act. However, there may be some question as to whether or not the terminal is excepted from 7 Del. C. § 7002(f) by virtue of the fact that it is "a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted".

It is my opinion that the El Paso Eastern terminal does not fit within the "single industrial or manufacturing facility" exception. The Delaware courts have uniformly held that the meaning of a statute depends on the intent of the legislature and that such intent must be ascertained from an interpretation of the act as a whole. The facts contained in the letter from the El Paso Eastern

Company indicate that the LNG terminal in question is merely a way station in the natural gas transportation system which El Paso Eastern is endeavoring to develop. It is quite clear that the legislative intent was to permit docking facilities where such facilities would benefit such industries as would be granted permits to operate in the Coastal Zone. Here the situation is reversed. The terminal will only exist as an adjunct to the docking facility. In other words, the important part of the project to El Paso Eastern is not the "industrial facility" but the docking facility. Further, I assume that the facility proposed by El Paso Eastern is not the type of "single industrial or manufacturing facility" for which your office would grant a permit under 7 Del. C. § 7004. The statute specifically mandates that such approval is necessary.

With specific reference to situations similar to the one here in issue, it is my recommendation that your office more clearly define "single industrial or manufacturing facility". The definition should explicate the legislative intent to allow an exception for docking or pier facilities only where the facilities are to be used in conjunction with industries of the type permitted under 7 Del. C. § 7003. The definition I envision will permit your office to evaluate applications for construction on the New Jersey shore as if they were applications for construction on the Delaware shore. Such a standard would negate claims that applications which require the approval of more than one governmental agency are acted upon by Delaware in an arbitrary or capricious manner. However, it must be clear that Delaware is not attempting to regulate development beyond the state boundary. Therefore, any reference to potential development in New Jersey should be avoided.

If you should wish to discuss this matter further, please do not hesitate to contact me. Also at this time I would like to stress that this is an informal advisory opin-

ion. Please advise me if a formal opinion becomes necessary.

Sincerely,

/s/ LAIRD

W. Laird Stabler, Jr.
Attorney General

WLSJr:ls

EXHIBIT B

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TRENTON 08625

OFFICE OF THE COMMISSIONER

March 2, 1972

Mr. David R. Keifer
Director of State Planning
Thomas Collins Building
Dover, Delaware

Dear Mr. Keifer:

Under the riparian laws of New Jersey, anyone proposing to alter or build upon lands below mean high tide must have the necessary approval from this Department. It is our policy to consider applications with respect to the degree of true public interest to be served and to the degree of environmental damage to be rendered.

On major proposals such as that apparently contemplated by El Paso Eastern Company we would require a complete environmental impact statement including base line studies before any decision is made. This would apply not only to that part of the proposal situated below mean high tide, but to the entire project.

In this case it is difficult to be more specific as to the status of the case and the probability of our decision, since El Paso has not made any application to this Department and we have no specific knowledge of their proposal.

I agree that it would be useful to communicate on matters of joint interest. You can expect to hear from Richard D. Goodenough, Director of the Division of Marine Ser-

vices whenever an application appears to effect the statutes of both of our States.

Very truly yours,

/s/ RICHARD J. SULLIVAN
Richard J. Sullivan
Commissioner

EXHIBIT C

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
PO BOX 1401
DOVER, DELAWARE 19903

OFFICE OF THE
SECRETARY

November 19, 1990

Richard V. Ciliberti, Vice President
Keystone Cogeneration Systems Inc.
313 Chestnut Street
Philadelphia, PA 19106

Dear Mr. Ciliberti:

Please find enclosed my decision on your Coastal Zone Act status decision application of July 13, 1990.

My decision is that the proposed pier is not a prohibited offshore bulk product transfer facility provided a Coastal Zone Act permit is granted for the Cogeneration plant (including the intake and outfall). Obtaining such a permit is necessary for the pier to qualify for the single industrial use exemption found in the Delaware Coastal Zone Act's definition of bulk product transfer facility.

You have the right to appeal this decision to the state's Coastal Zone Industrial Control Board within fourteen (14) days following the date of the legal notice.

There will be a newspaper legal notice of this decision within a few days of this letter. If no appeal is received within fourteen (14) days following the date of the legal notice, this decision becomes final and you will receive a notice to that effect. Your company will be billed for the legal notice.

If you have any questions about this decision or the appeal process, please call Dennis Brown at 739-5409.

Sincerely,

/s/ EDWIN H. CLARK, II
Edwin H. Clark, II
Secretary

EHC:RHM:bh

FAXED TO:
ERNIE HAUSER
HARDING DRANE, ESQ.
BOB BUCKNAM, JR., ESQ.

CC: JOHN W. GULLIVER ESQ.
DAVE DENISON, P.E.

Coastal Zone Status Decision
CZA Project No. 237SD

THE PROJECT

1. The proposed project is an adjunct to a power generation facility to be constructed in New Jersey. Keystone Cogeneration Systems Inc. proposes to construct a 200 megawatt coal fueled cogeneration facility in Logan Township, Gloucester County, New Jersey, and an 1100 foot pier in the Delaware River. Electric power will be sold to Atlantic City Electric Co. and steam will be sold to neighboring Monsanto Chemical Company (Delaware River Plant).

2. The power generation plant facilities are those normally associated with power plants such as a turbine building, a boiler building, an administration facility, maintenance shop and warehouse building, water treatment building, transformers, cooling tower, pumphouse, tanks, pumps, flue gas desulfurization systems, chimney or stack fly ash silo, switchyard, wastewater systems, and lime and coal storage, and handling systems.

3. The status decision application seeks a ruling on (1) a pier which will extend into the Delaware River, (2) a raw water intake system, consisting of two vertical turbine pumps located on this pier platform, and (3) one wastewater outfall located in the pier area for the discharge of stormwater runoff, treated wastewater, and cooling tower blowdown.

4. The pier will be owned and used by the applicant for the single purpose of offloading coal and lime from vessels docked at the pier and for onloading ash. The applicant acknowledges that no other entity will use the pier for the offloading/onloading of any bulk product and that the coal, lime and ash will be utilized/generated solely by the power plant.

PROJECT HISTORY

5. On December 15, 1988, Sun Refining and Marketing Company applied for a Coastal Zone Act status decision to determine, prior to final sale, whether or not a pier extending from the New Jersey shoreline into the Delaware River beyond the mean low water mark, is regulated by the act.

6. Acting Secretary Hughes' May 5, 1989, status decision stated that the proposed pier is a prohibited offshore bulk product transfer facility in accordance with Section 7003 of the act.

7. On May 17, 1989, the applicant appealed the decision, and a hearing before the Coastal Zone Industrial Control Board was scheduled for June 27, 1989. By stipulation of the parties, dated June 15, 1989, the Secretary's decision was withdrawn and vacated, the hearing was canceled, the applicant withdrew his appeal, and the status decision application was remanded to the Secretary for further consideration of additional information to be provided by the applicant. On September 13, 1990, the applicant supplemented its application with additional information, and the review process was reinstituted.

LEGAL FINDINGS

8. The pier constitutes a prohibited bulk product transfer facility, unless it will serve a single industrial or manufacturing facility for which a permit is granted by the Department.

9. The plant, including the intake and the outfalls, is a manufacturing facility which could receive a coastal zone permit from the Department if it satisfies the requirements of 7 Del. C. Section 7004.

ORDER

10. The Department hereby grants applicant a conditional coastal zone status decision that the pier does not constitute a prohibited bulk product transfer facility.

11. This status decision is expressly conditioned on the applicant eventually receiving a coastal zone permit for the plant. The failure to procure such permit for the plant will render applicant's conditional coastal zone status decision null and void.

12. The Department has the further understanding regarding the Department's future coastal zone permit decision for the plant:

(a) That any Department permit encompass the entirety of the plant, not only the coastal zone components; and

(b) That the Department will consider the plant's impact on the coastal zone only for the purpose of rendering its coastal zone permit decision.

/s/ EDWIN H. CLARK, II
Edwin H. Clark, II
Secretary

Date:

EXHIBIT D

[Company Logo omitted]

Golder Associates Inc.

1951 Old Cuthbert Road, Suite 301
Cherry Hill, NJ 08034
Telephone (856) 616-8166
Fax (856) 616-1874

September 27, 2004

Project No. 043-6313
via Federal Express

Department of Natural Resources and
Environmental Control
Division of Water Resources
Wetlands and Subaqueous Lands Section
89 Kings Highway
Dover, DE 19901

RE: Permit Application
Subaqueous Lands, Wetlands, Marina and Water Quality Certification Projects – Delaware River Geotechnical Borings and Cone Penetrometer Tests

Ladies and Gentlemen:

Golder Associates Inc. (Golder) is submitting this permit application for Subaqueous Lands, Wetlands, Marina and Water Quality Certification Projects for review and approval by the Delaware Department of Natural Resources and Environmental Control, Division of Water Resources, Wetlands and Subaqueous Lands Section. This permit application has been prepared by Golder for a water-based survey investigation program consisting of cone penetrometer tests (CPTs) and geotechnical borings within the Delaware River. The Site lies just offshore from the Logan Electric Co-Generation Plant in Logan Township, Gloucester County, New Jersey. However, the

proposed borings and CPTs are all located within Delaware State boundaries.

This application is being submitted pursuant to a telephone conversation between Ms. Laura Herr of the Wetlands and Subaqueous Lands Section and Mr. Michael Hart of Golder on September 16, 2004. Although Nationwide Permit No. 6 permits such survey activities with the river, Ms. Herr indicated that approval from the Wetlands and Subaqueous Lands Section would also be required prior to the start of work. Ms. Herr indicated that there were no specific permit appendices that pertain specifically to the survey activities proposed, and therefore instructed Golder to use only the basic application form and answer all questions that were pertinent to the survey activities that will actually be performed. In addition to the application form, Golder was instructed to provide a detailed description of the work being performed as well as a plan of the site and boring and CPT locations. As such, the following paragraphs provide greater detail about the survey investigation program; Attachment 1 contains the completed basic permit application form; and, a plan of boring and CPT locations is provided as Attachment 2.

The purpose of this survey investigation is to gather information for the design of a receiving terminal to support the proposed liquefied natural gas (LNG) storage facility in Logan Township, New Jersey. Information from this investigation will be used for pier and bulkhead design, deepening for vessel berthing, and other ancillary features typical of such terminals. The survey investigation program will consist of fourteen (14) CPTs and five (5) geotechnical borings performed using barge-mounted investigation equipment within the Delaware River. As shown on the plan (Attachment 2) the boring and CPT locations lie outside of the navigable channel and anchorage limit and within the boundaries of the State of Delaware.

The investigation equipment will consist of geotechnical drill rig mounted to an approximately 30'x90' barge with a four-point anchoring system to keep position over the boring/CPT location. A tug boat will be used to position the barge over the boring/CPT locations and will also serve as a transport vessel for the drilling crew and observation personnel. All personnel working on the barge will depart from a docking facility on the New Jersey shore of the Delaware River each day. The sampling barge will remain in the river until the completion of the project. Both the sampling barge and tug boat conform to all necessary safety standards and the U.S. Coast Guard has been contacted and made aware of proposed project.

Borings will be advanced using mud-rotary drilling methods and samples will be collected via split-spoon sampler in general accordance with the American Society for Testing and Materials (ASTM) Standard Method D1586, and by direct-push Shelby tube in general accordance with ASTM D1587. In-situ vane shear testing (ASTM D2573) will also be performed within some of the borings. Where necessary to determine bedrock type, quality, and competency, diamond core drilling with an NX-size core barrel will be performed in accordance with ASTM D2113 to obtain samples of bedrock. Upon completion of each boring, the drilling rods, sampling equipment, and casing will be removed and the borehole tremie grouted to the mudline. Drill cuttings and drilling mud will be deposited upon the river bottom.

Cone penetrometer testing will be performed using an electronic piezocone. The CPTs will be advanced through the water column via casing set into the mudline and then by direct-push in accordance with ASTM D5778. The small diameter hole created during cone penetrometer testing typically closes upon cone extraction so grouting is not envisioned.

In addition to Ms. Herr, Ms. Susan Love from the Delaware Coastal Programs and Mr. Kevin Dougherty from

the U.S. Army Corps of Engineers were also contacted regarding permitting. Both agencies indicated that they did not require any additional permitting for the proposed project.

This letter has attempted to provide the necessary information which is not included on the permit application in order to assist with the processing of this application. The anticipated commencement date for the survey investigation program is Monday, October 4, 2004. It is estimated that the program will require 3 to 4 weeks to complete. Therefore, time is of the essence and we respectfully request that the Wetlands and Subaqueous Lands Section expedite its review.

If there are any questions regarding this permit application please do not hesitate to contact either of the undersigned.

Very truly yours,

GOLDER ASSOCIATES INC.

/s/	ROBERT S. VALORIO	/s/	MICHAEL F. HART
	Robert S. Valorio, P.E.		Michael F. Hart
	Senior Project Engineer		Project Engineer

Attachments

cc: R. Stetkar, Golder Associates Inc.

Last Revised on: July 17, 2003

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WETLANDS

Wetlands and Subaqueous Lands Section Basic Application Form

ATTACHMENT 1

24a

Section 1: Applicant Identification

1. Applicant's Name: BP Gateway Landing, LLC
Mailing Address: 501 West Lake Park Blvd.
Houston, TX 77079
Telephone #: (281) 366-5876
Fax #: (281) 366-3436
E:mail: bcpole@bp.com

2. Consultant's Name: Golder Associates Inc.
Mailing Address: 1951 Old Cuthbert Rd
Cherry Hill, NJ 08034
Suite 302
Telephone#: (856) 616-8166
Fax #: (856) 616-1874
E:mail:

3. Contractor's Name: Wagon Gauge Inc.
Mailing Address: P.O. Box 413
Foot of Jersey Ave.
Jersey City, NJ 07303
Telephone #: (201) 433-9271
Fax #: (201) 433-9139
E:mail:

Section 2: Project Description

4. Is the project:
A new project or an addition to an existing project? ✓ Repair or Replacement of an Existing Structure? ☐
Both? ☐

5. Check each Appendix that is enclosed with this application:

☐A. Boat Docking Facilities	☐G. Bulkheads	☐N. Preliminary Marina Checklist
☐B. Boat Ramps	☐H. Fill	☐O Marinas
☐C. Road Crossings	☐I. Rip-Rap	☐P. Stormwater Management
☐D. Channel Modifications/Dams	☐J. Vegetative Stabilization	☐Q. Ponds and Impoundments
☐E. Utility Crossings	☐K. Jetties,Groins,Breakwaters	☐R. Maintenance Dredging
☐F. Intake or Outfall Structures	☐M. Projects in Wetlands	☐S. New Dredging ✓

Section 3: Project Location

6. Project Site Address: NA
Site located on the Delaware River
Name of site owner: NA
(if other than applicant)
County: N.C.☐ Kent☐ Sussex☐

7. Driving directions from the nearest intersection of two State roads: NA
(Attach a location road map with the site indicated on the map).

8. Tax Parcel Number: NA Subdivision Name: NA

WSLS Use Only:
Type of Auth: SP ✓ SL☐ WE☐ WQ☐ SA☐ SU☐ LA☐ MP☐ WA☐ EX☐
Permit #s:
SPGP: 18☐ 20☐ Individual Permit:☐ Nationwide Permit #:
Received Date: Project Scientist:
Fee Received? Yes☐ No☐ Amt: $$ Receipt #:
Public Notice #: 24 Public Notice Dates: ON 10/13/04 OFF 11/2/04

Last Revised on: July 17, 2003

Section 3: Project Location (Continued)

9. Name of Waterbody at Project Location: Delaware River
Waterbody is a Tributary to: N/A

10. Is the waterbody: (Tidal) Non-tidal

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SEP 28 2004
WETLANDS

11. Is the project:
On public subaqueous lands? ✓ On private subaqueous lands? In wetlands?

If the project is on private subaqueous lands, indicate the name of the subaqueous lands owner:

(Written permission of the private subaqueous lands owner must be included with this application).

12. Present Zoning is: Agricultural Residential Commercial Industrial Other ✓

Section 4: Miscellaneous

13.A. List the name and complete mailing address of the immediately adjoining property owners on all sides of the project. (Attach additional sheets as necessary):

N/A

B. For wetlands and marina projects, list the name and complete mailing address of each property owner within a 1000 foot radius of the project. (Attach additional as necessary)

NA

14. Provide a brief description of the project purpose:

The project will consist of geotechnical borings and CPTs advanced in the Delaware River for use in designing port structures

15.A. Indicate the names of all representatives from the Department and the Army Corps of Engineers who you have discussed the project with:

Susan Love — Delaware Coastal Programs
Laura Herr — Department of Wildlife Management
Kevin Dougherty — Army Corps of Engineers

B. Have you had a State Jurisdictional Determination performed on the property? Yes (No)
C. Has the project been reviewed in a monthly Joint Permit Processing Meeting? Yes (No)
If yes, what was the date of the meeting?

16. Have you applied for or obtained any previous authorizations from the WSLS for projects at this site, or is there a current subaqueous lands lease for any fill or structures on public underwater land? Yes (No)
If yes, what permit or lease number(s) were assigned?

17. Have you applied for or obtained a federal permit for the project from the Army Corps of Engineers?
Applied? Yes (No) If yes,
Type of permit applied for:
Date application was submitted:
Federal Identification # Assigned:
Obtained? Yes No
Federal Permit #:
Date Issued:

This work is permitted under Nation Wide Permit #6.

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SEP 28 2004
NJ DEP BUREAU

Section 5: Signature Page

18. **Agent Authorization**:
If you elect to complete this agent authorization section, all future correspondence to the Department may be signed by the duly authorized agent. In addition, the agent will become the primary point of contact for all correspondence from the Department.

I do not wish to authorize an agent to act on my behalf. [ ]

I wish to authorize an agent as indicated below. [ ]

I, Lauren Segal BP Crowleaton LLC, hereby designate and authorize
Name of Applicant
Golder Associates Inc to act on my behalf in the processing
Name of Agent
of this application and to furnish any information that is requested by the Department.

Applicant's Signature _____ Date 9/24/04

Authorized Agent's Name: Golder Associates Inc.
Mailing Address: 1951 Old Cuthbert Rd
Cherry Hill, New Jersey 08034
Suite 301

Telephone #: (856) 616-8166
Fax #: (856) 616-1824
E-mail: _____

I hereby certify that the information on this form and on the attached plans is true and accurate to the best of my knowledge. I understand that the Department may request information in addition to that set forth herein if deemed necessary to appropriately consider this application.

Agent's Signature Pete Swinick Date 9/27/04

19. **Applicant's Signature**:

I hereby certify that the information on this form and on the attached plans is true and accurate to the best of my knowledge. I understand that the Department may request information in addition to that set forth herein if deemed necessary to appropriately consider this application. I grant permission to the authorized Department representative(s) to enter upon the premises for inspection purposes during working hours.

Applicant's Signature _____ Date 9/24/04

Co-Applicant _____ Date _____

Lauren Segal
Segal

EXHIBIT E

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DIVISION OF WATER RESOURCES
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Wetlands and Subaqueous
Lands Section

October 29, 2004

Lauren Segal
BP Crown Landing, LLC
501 West Lake Park Blvd
Houston, TX 77079

RE: Subaqueous Lands Permit Application No. SP-389/04 for BP Crown Landing, LLC

Dear Ms. Segal:

After reviewing the above-referenced permit application and considering public comments received during the public notice process, we have determined that we cannot make a decision on your application until a determination has been made regarding whether construction of an LNG storage facility is an activity permissible in Delaware's coastal zone.

Accordingly, we are requesting that you withdraw your subaqueous lands permit application to perform 19 geotechnical test borings until the conclusion of the coastal zone status decision process. If the proposed LNG storage and transfer activities are determined to be ones that are permissible in the coastal zone, the application for the test borings can be re-submitted at that time.

If you should have any questions regarding this matter, please feel free to contact me at 302/739-4691.

Sincerely,

/s/ LAURA M. HERR
Laura M. Herr
Program Manager
Wetlands and Subaqueous Lands Section

cc: Pete Swinick, Golder Associates, Inc.
John A. Hughes, Secretary, DNREC
Kevin C. Donnelly, Director, Division of Water Resources

EXHIBIT F

[Company Logo omitted]

Golder Associates Inc.

1951 Old Cuthbert Road, Suite 301
Cherry Hill, NJ 08034
Telephone (856) 616-8166
Fax (856) 616-1874
www.golder.com

November 4, 2004

Project 043-6313
Via Facsimile and Federal Express

Department of Natural Resources and Environmental Control
Division of Water Resources
Wetlands and Subaqueous Land Section
89 Kings Highway
Dover, DE 19901

RE: Permit Application
Subaqueous Lands, Wetlands, Marina and Water Quality Certification Projects – Delaware River Geotechnical Borings and Cone Penetrometer Tests

Ladies and Gentlemen:

Golder Associates Inc. (Golder) submitted the referenced permit application for Subaqueous Lands, Wetlands, Marina and Water Quality Certification Projects for review and approval by the Delaware Department of Natural Resources and Environmental Control, Division of Water Resources, Wetlands and Subaqueous Lands Section (DNREC) on September 27, 2004. Golder respectfully withdraws the referenced application for a Subaqueous Permit at this time.

Golder's withdrawal of the referenced permit application is made without prejudice to any future filing for this application or any other application before DNREC or any other agency of the State of Delaware by Golder, Crown Landing LLC or any of their respective affiliates (collectively "Applicant Group"). Furthermore, Golder withdraws the referenced permit application without waiver of any right that any member of Applicant Group may or may not have or position that any member of Applicant Group may or may not assert in connection with such a prospective filing.

If there are any questions regarding this permit application withdrawal please do not hesitate to contact me.

Very truly yours,

GOLDER ASSOCIATES INC.

/s/ ROBERT E. STETKAR
Robert E. Stetkar, P.E.
Geotechnical Practice Leader & Principal

RES/res
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Cc: Lauren Segal, BP America

DNREC Requests BP Withdraw Subaqueous Lands Permit Application – BP Agrees

Department of Natural Resources and Environmental Control Secretary John A. Hughes today announced that the agency has requested that British Petroleum (BP) withdraw its subaqueous lands permit application in support of the Liquefied Natural Gas (LNG) terminal proposed for Logan Township, New Jersey. **In response, BP has withdrawn its application in a letter to DNREC dated Nov. 4.**

DNREC notified BP by letter that the Department must await **the company's** application for a Delaware Coastal Zone status decision, and a determination from the Secretary on how the facility is to be treated under Delaware's Coastal Zone Act prior to acting on the subaqueous lands permit application. BP had recently filed an application seeking permission to conduct structural subsurface borings in the river bottom.

BP's proposal to construct an LNG terminal along the banks of the Delaware River are contingent on receipt of permitting approvals from DNNEC, as well as New Jersey and the Federal Energy Regulatory Commission (FERC). DNREC ~~has~~ previously informed BP that a coastal zone status decision should be the first application it should submit to DNREC. BP has informed DNREC that an application is forthcoming. In the meantime, a subaqueous lands permit application for test borings in the river bottom were the subject of a public notice published Oct. 13. DNREC ~~had~~ received several requests for a public hearing on the application.

Delaware's Coastal Zone Act excludes new heavy industries and bulk product transfer facilities from Delaware's coastal zone. While BP's proposed facility is in New Jersey, the pier necessary for off loading of ships would extend into the Delaware River and over Delaware-

owned public subaqueous lands. The status decision process under the Regulations Governing Delaware's Coastal Zone offers applicants a process for obtaining a ruling from the Secretary of DNREC as to how any proposed facility might be addressed under the Act.

"We can't determine the outcome of the status decision process without an application and supporting materials from the applicant. As soon as the application comes in, we'll process it and make a determination," said Secretary Hughes.

BP's application will be made available for public review as part of the status decision process.

EXHIBIT G

LEGAL NOTICE

COASTAL ZONE ACT STATUS DECISION

Re: Crown Landing LLC

Under the authority of the Delaware Coastal Zone Act (7 Del. Code, Ch. 70) and the "Regulations Governing Delaware's Coastal Zone", the Secretary of the Department of Natural Resources and Environmental Control (DNREC) has rendered a decision on a Request for a Coastal Zone Act Status Decision application from Crown Landing LLC. The company sought the status decision to ascertain if a new pier facility to transfer liquefied natural gas (LNG) from ships in the Delaware River to storage tanks in New Jersey is allowable under the Coastal Zone Act.

The proposed facility would occupy 19 acres in the Delaware River for a 2000 foot pier with one ship berth. The pier could accommodate LNG carriers from 138,000 cubic meters to 200,000 cubic meters in capacity. The pier would have one 44-inch diameter liquid unloading line to the storage tanks. The pier would convey the LNG to storage tanks on land in Logan Township, New Jersey where existing gas pipelines will convey the gas to customers in the region.

The Secretary's decision on this application is that the proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, the Secretary has found that this facility, as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the Secretary has determined that the on-shore storage tanks essential to the operation of the facility are prohibited structures.

There is a fourteen day appeal period following the date of publication of this legal notice. Anyone desiring to appeal this decision to the State Coastal Zone Industrial Control Board must do so within the appeal period. There is a one-hundred dollar appeal fee. An appeal application may be acquired by calling Dennis Brown at 739-3091. If no appeal is received, this decision becomes final.

/s/ JOHN A. HUGHES
John A. Hughes, Secretary Date 2/3/05

INSTRUCTIONS:

1. Please publish as a legal notice ASAP
2. Send bill and affidavit to: Dennis Brown
DNREC
89 Kings Highway
Dover, DE 19901
Ph. No. 739-3091
Billing Code: SD0240

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

February 3, 2005

CERTIFIED MAIL
Return Receipt Requested

Ms. Lauren Segal
Vice President
Crown Landing LLC
501 West Lake Park Blvd.
Houston, TX 77079

Re: Coastal Zone Act Status Decision

Dear Ms. Segal:

Based on the public comments, the assessment and recommendations of DNREC staff, and discussions with our legal representatives, I have reached a decision on your application for a coastal zone status request.

I find that your proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, I conclude that this facility, as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the on-shore storage tanks essential to the operation of the facility are prohibited structures.

This decision does not come without some appreciation of the need for additional natural gas supplies in this country nor the relative cleanliness of natural gas compared to other energy fuels. Despite the benefits that increased LNG imports might bring, placement of this facil-

ity within the boundaries of Delaware is, in my opinion, clearly a prohibited use within Delaware's coastal zone.

There is a fourteen-day appeal period following the publication of the enclosed legal notice announcement of this decision. If you wish to appeal this decision to the State Coastal Zone Industrial Control Board, please call Dennis Brown at 302-739-3091 for an appeal form. There is a one-hundred dollar appeal fee. If no appeal is received within the appeal period, this decision becomes final.

Sincerely,

/s/ JOHN A. HUGHES
John A. Hughes
Secretary

pc: Dennis Brown
David S. Swayze
Michael W. Teichman

Enclosure

MEMORANDUM

TO: John Hughes

THRU: David Small

FROM: Philip Cherry
Dennis Brown

DATE: February 2, 2005

RE: BP/Crown Landing Status Decision
Assessment and Recommendations

Please consider this memorandum as our assessment of the BP - Crown Landing LLC status decision application. We have carefully considered the application and supporting legal memorandum, consulted with the Attorney General's Office and reviewed all of the comments received from the public in preparing this assessment. Copies of all public comments are attached hereto as an addendum to this report.

The status decision application from Crown Landing LLC was received on December 7, 2004 and deemed administratively complete with publication of the required legal notice on January 9, 2005. The required 10 day comment period concluded on January 24 and, under the regulations, you have until February 15, 2005 to make a decision.

It should be noted in this assessment that this proposed project could bring significant benefits to Delaware. Natural gas is a welcome alternative to dirtier sources of energy, is needed along the eastern seaboard to maintain reliable and cost competitive supplies and can be a significant help in easing this country's reliance on imported oil. LNG imports will likely figure prominently in meeting the nation's needs for additional energy and this is one of many such proposals across the country. This industry

also has an overall impressive safety record and decades of experience in moving and utilizing LNG.

The question before you, however, is not the relative benefits of natural gas, but an even more straightforward one. Is the LNG pier a bulk product transfer facility under the Coastal Zone Act (and prohibited) or can it be exempted under the Act as "... a pier for a single industrial or manufacturing facility for which a permit is granted or which is a non-conforming use."? After careful consideration of the application, we offer the following thoughts in support of a determination that the facility is prohibited under the Act.

1. There seems to be no argument that the movement of LNG from a ship to shore would be considered a bulk product transfer, absent any argument for the single use industrial exemption. It would appear this is exactly the type of activity that is the subject of the CZA – and the prohibition – in the first place.

2. The single use bulk product transfer exemption was intended to accommodate either one of two scenarios – neither of which applies in the BP case. The first is a situation where an existing grandfathered use might want to wharf out over the river to accommodate its existing industrial or manufacturing use at some point in time following passage of the Act. This clearly doesn't apply in the BP case. The second situation was intended to apply to new manufacturing uses proposed within the zone which might take advantage of Section 7004 (a) which states in part "... manufacturing uses not in existence and in active use on June 28, 1971 are allowed in the Coastal Zone by permit only". The phrase "by permit only" means, in our view, a coastal zone permit issued to a manufacturing facility regulated un-

der the Act. The BP facility cannot be granted a permit under the exemption for a bulk product transfer facility because, simply considered on its merits, this LNG terminal is a bulk product transfer facility, not a manufacturing use.

3. The manufacturing label that the applicant wishes to place upon itself (in order to enjoy the bulk product facility exemption) doesn't apply, in our opinion, for two reasons:

   - It doesn't meet the definition of "manufacturing" which reads in part ". . . the mechanical or chemical transformation or organic or inorganic substances into new products . . ." The LNG is a result of pumping natural gas out of the ground at another location, and super cooling it to establish a liquid, making it economical to transport. Regassifying the LNG and adding nitrogen and an odorizer do not, in our opinion, meet the manufacturing test. BP is simply returning the substance to its natural state (with slight modification), not manufacturing it.

   - The US Department of Commerce, Bureau of the Census classifies LNG terminals under the new 2002 North American Industry Classification System (NAICS). The classification code for an establishment storing natural gas, including liquefied natural gas, is 486210, Pipeline Transportation of Natural Gas. The classification of an establishment re-gasifying LNG is the same, Pipeline Transportation of Natural Gas. These codes are not within the NAICS manufacturing designations. Similar results are found under the old SIC code designations.

4. The application suggests an analogous situation with the single use pier allowed for the Logan generating station adjacent to the proposed LNG terminal. In that instance, the Secretary issued a coastal zone permit for the Logan facility under a finding that the generation of power from the burning and consumption of the coal in that process is "manufacturing". Logically then, the pier, to be situated in the Delaware River met the bulk product transfer exemption. For the reasons stated above, the situation found in the BP application is not similar to the Logan station matter and the comparison cannot be applied. In our opinion, BP outlines a process for re-gasification of the LNG, not the manufacture of LNG.

5. The question as to whether this facility as proposed, is a heavy industry is raised in this application and an analysis of whether this facility meets that definition is appropriate. The applicant goes to some length to explain away any possibility that this proposed facility could be considered a heavy industry. The application requires us to analyze the on-shore facility and ascertain whether characteristics found in the definition of "heavy industry use" are sufficiently present in the application to make a definitive determination.

   The starting point for this analysis begins again with a definition of "manufacturing use."

   "Manufacturing" means the mechanical or chemical transformation of organic or inorganic substances into new products characteristically using power-driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided

the new product is not a structure or fixed improvement.

By its definition, manufacturing use is a process by which new products are produced and is allowable by permit in the Coastal Zone. However, a heavy industry, to be so classified, does not need to qualify under the manufacturing definition as part of the Department's analysis.

The analysis required to determine whether a use is a heavy industry is entirely different, and starts with a careful review of the definition:

"Heavy Industry Use" means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equip-

ment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of off-shore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.

Found within Crown Landing's Application are representations that certain of the characteristics in the "heavy industry" definition will be employed at the facility. These characteristics include (1) a smokestack, (2) a distillation tower, (3) three tanks; a small tank farm is present and (4) it is contended that there will be chemical processing equipment. Additionally this facility will utilize approximately forty acres of land and about nineteen acres of Delaware River bed, excluding on-shore buffers and exclusive zones. This clearly utilizes more than the twenty (20) acre threshold discussed in the "heavy industry use" definition. If one looks at this facility in conjunction with the definition of "heavy industry use" on a characteristic basis (as opposed to a process based analysis found in the "manufacturing" definition) one can easily conclude the upland facility represents a new heavy industry use.

6. Another issue for your consideration entails further review of the definition of "Heavy Industry Use". After listing examples of what the General Assembly believed clearly qualified as a heavy industry use the definition goes on to include generic examples not included in a heavy industry use. These examples describe what the Legislature deemed to be the process employed in classic

manufacturing and other on-shore facilities as well as those appurtenances to the facility "provided, however, that on-shore facilities shall not include tank farms or storage tanks."

Crown Landing, LLC's Application clearly establishes that a small tank farm will be present on the proposed site. It may be argued that there is no "tank farm" but the tanks described in the application certainly will be used for on-shore storage. This contradicts the Applicant's position that the upland facility is consistent with the Coastal Zone Act. Uses to be established in the Coastal Zone by permit, or those exempted by the Act, must be those facilities not encompassing a tank farm or on-shore storage tanks as set forth in the Act.

7. Another element to be considered under the heavy industry question is the facility's "potential to pollute when equipment malfunctions or human error occurs". The application addresses this issue by suggesting that in the event of a spill there is no potential to pollute, other than temporary thermal alteration of Delaware River water. It might be argued that a spill of LNG on lands adjacent to the River and pier might be considered pollution (destroying flora or fauna through asphyxiation or temperature effects), as might the dissipation of methane (a potent greenhouse gas). Were the boiled off methane to ignite, clearly the potential to pollute would be significant, considering the byproducts of combustion.

8. We've also investigated how the four other facilities around the country are classified under applicable land use and zoning laws. Obviously, Delaware's Coastal Zone Act is a unique one and the manufacturing vs. bulk product transfer

question is similarly unique to Delaware, so no comparison to other states can be made concerning that question. It is interesting to note, however, that while the Cove Point facility is located in an area zoned "light industrial" (as highlighted in the application) both the Elba Island, Georgia and Lake Charles, Louisiana facilities are located in areas zoned for heavy industry. The Everett, Massachusetts facility is zoned Industrial.

9. The application cites several instances where previous status determinations have been made that certain activities were governed under the Act, primarily due to a Delaware Supreme Court ruling in 1992 that the Act should be "construed liberally to effectuate its purposes". In those instances, liberally construing the Act resulted in debatable activities being regulated under the Act. In the present case, the applicant is arguing for a liberal construction of the Act to ease the burden of regulation upon an applicant, in direct contrast to the purpose of the Act which was to "prohibit . . . new heavy industry . . . and control industrial development . . . ." A liberal construction of the Act ("to effectuate its purposes") in this case would be to determine the activity to be a bulk product transfer facility and hence prohibited, not to classify the land based portion of the facility to be manufacturing so the pier could be exempted.

10. This application has generated a large amount of public commentary. Over 200 pieces of correspondence and/or telephone calls have been received, with all but one being opposed to the project.

The foregoing are our views on the application and the question before you. We have not considered the safety or

environmental aspects of this project in this review because they are premature in the context of a status decision application. Should this project be deemed permittable, those issues should be carefully considered, as called for in the Act.

Cc: Keith Trostle

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

January 5, 2005

Ms. Lauren Segal
Vice President
Crown Landing LLC
501 West Lake Park Blvd.
Houston, TX 77079

Re: Delaware Coastal Zone Act Status Decision
Application

Dear Ms. Segal:

This letter is to inform you that your Request for a Coastal Zone Act Status Decision is administratively complete. The application is signed, dated and all the applicable questions have been addressed sufficiently so as to allow the public an opportunity to examine and comment on your application. This does not preclude the Department from requesting additional information or data regarding this application.

There will be a legal notice in two local newspapers announcing the opening of the 10 business day comment period. I have enclosed a copy of that notice for your files. Please call me at 302-739-3091 if you wish to discuss this.

Sincerely,

/s/ JOHN A. HUGHES
John A. Hughes
Secretary

Cc: David S. Swazy
Keith Trostle, DAG
Dennis Brown

Enclosure

BP-Crown admin-complete let

Brown Dennis E. (DNREC)

From: Mike Teichman [mteichman@pgslegal.com]
Sent: Wednesday, January 19, 2005 6:08 PM
To: Brown Dennis E. (DNREC)
Cc: Dave Swayze
Subject: BP -- Crown Landing

Dear Dennis:

Pursuant to our telephone conference earlier this week, please consider this e-mail as the request of this firm, pursuant to Delaware's Freedom of information Act, 29 Del. C. Ch. 100, to obtain copies of all public comment received by the Department of Natural Resources and Environmental Control in response to the recent publication of the Status Decision Request of Crown Landing LLC under the Coastal Zone Act. This request would include all written comments received from the date of publication through January 24, 2005.

We are prepared, of course, to bear all reasonable costs of the Department in making copies of these documents. Alternatively, we can arrange for a representative of this firm to make such copies at your location.

I look forward to hearing from you. Thanks for your cooperation.

Regards,

Michael W. Teichman, Esq.
Parkowski Guerke & Swayze, P.A.
800 King Street, Suite 203
Wilmington, DE 19801
Tel: 302.594.3331
Fax: 302.654.3033
E-mail: mteichman@pgslegal.com

New Castle Weekly

203 Delaware Street, New Castle, DE 19720-4815
328-6006

AFFIDAVIT OF PUBLICATIO

STATE OF DELAWARE
COUNTY OF NEW CASTLE

Personally appeared before me this 13th day

LEGAL NOTICE

Receipt of a Request for a Coastal Zone Act Status Decision

Re: BP; Crown Landing, LLC

The Department of Natural Resources and Environmental Control (DNREC) has received a request for a Coastal Zone Act Status Decision from Crown Landing, LLC, a subsidiary of BP. The applicant is seeking a status decision to determine the applicability of the Coastal Zone Act to their plans to construct and utilize a liquefied natural gas (LNG) docking facility in the Delaware River in Logan Township, New Jersey. The proposed docking facility is planned to be 2,000 feet long and have one berth. The docking facility will be able to receive one or two ships per week. Each LNG ship would carry from 138,000 to 2000,000 cubic meters of LNG.

The application is on public display at the DNREC offices at 89 Kings Highway in Dover and 715 Grantham Lane south of New Castle, the Hockessin Public Library and the Delaware City Public Library. The public is invited to review the application and send comments to the DNREC, 89 Kings Highway, Dover, DE 19901, attention Dennis Brown. All comments should be at the DNREC by close of business on January 25, 2005. Afterwards, the DNREC Secretary will make a decision on this application and notify the public.

1/12

Mimi Carpenter of the *New Castle Weekly*, a weekly newspaper published in the City of New Castle, County of New Castle, State of Delaware, who being duly sworn, states that the attached advertisement of Receipt of a Request for a Coastal Zone Act Status Decision Re: BP; Crown Landing LLC

was published in the *New Castle Weekly* on 1/12/05

Mimi Carpenter, Publisher

Sworn to before me this 13th day of Jan. 2005

Earl J. Carpenter Jr.

EARL J. CARPENTER, JR.
NOTARY PUBLIC
STATE OF DELAWARE
My commission expires Sept. 25, 2008

Mailing:
The News Journal
PO Box 15505
Wilmington, DE 19850

Street
The News Journal
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New Castle, DE 19720
(302) 324-2500

Sunday News Journal
The News Journal

50a

The News Journal

AFFIDAVIT OF PUBLICATION

STATE OF DELAWARE COUNTY OF NEW CASTLE

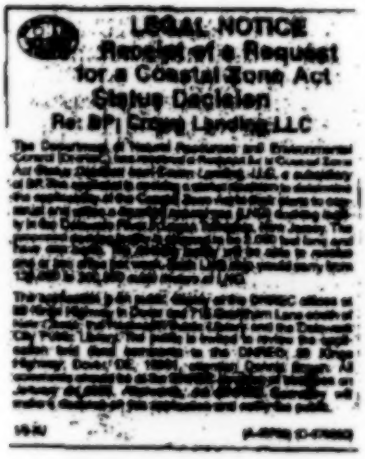
Personally appeared before me this 9th day of January, 2005:

I, Melissa Michelson, of the NEWS JOURNAL COMPANY, a daily newspaper printed and published in the County of New Castle, State of Delaware, who, being duly sworn states that the advertisement of S/D Coastal Zone-BP Crown Landing Refining was published in *THE NEWS JOURNAL* on n/a, and/or THE SUNDAY NEWS JOURNAL on January 9, 2005.

Melissa Michelson — Legal Coordinator
Name Title

Sworn to before me this 9th day of January, 2005.

Elizabeth A Bobeck
Notary Public



LEGAL NOTICE
Receipt of a Request
for a Coastal Zone Act
Status Decision
Re: BP Crown Landing LLC

EXHIBIT H

BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD OF THE STATE OF DELAWARE

APPEAL NO. CZ 2005-01

IN THE MATTER OF COASTAL ZONE STATUS DECISION ON THE APPLICATION OF Crown Landing LLC

DECISION AND ORDER

Pursuant to notice, a public hearing was held on March 30, 2005, in the Conference Center of Delaware Technical & Community College, Stanton Campus, Newark, Delaware, concerning the appeal filed on February 15, 2005, by Crown Landing LLC and the appeal filed on February 18, 2005, by *pro se* appellants John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty of a status decision of the Secretary of the Department of Natural Resources and Environmental Control issued February 3, 2005. Members of the Coastal Zone Industrial Control Board ("the Board") present were: Christine M. Waisanen, Chair, John Allen, Paul Bell, Albert Holmes, Pallather Subramanian and Victor Singer. Absent was Robert D. Welsh. John S. Burton and Judy McKinney-Cherry were disqualified from consideration of the matter. Phebe S. Young, Deputy Attorney General, represented the Board.

Crown Landing LLC was represented by David S. Swayze, Esq., and Michael W. Teichman, Esq., of Parkowski, Guerke & Swayze.

Collins J. Seitz, Jr., Esq. and Matthew Boyer, Esq., of Connolly Bove Lodge and Hutz LLP and Kevin Maloney, Deputy Attorney General, represented the Department of Natural Resources and Environmental Control ("DNREC") and DNREC Secretary John Hughes ("the Secretary").

PRELIMINARY MATTERS

On March 8, 2005 and March 9, 2005 respectively, Crown Landing LLC and DNREC filed motions to dismiss the appeals of John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty. The controlling statute, 7 *Del. C.* § 7007(b) provides that, "Any person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under subsection (a) of § 7005 of this title may appeal same under this section." The disputed appeals favor the Secretary's status decision but include assertions that the *pro se* appellants are nevertheless "aggrieved" by the Secretary's failure to impose fines pursuant to 7 *Del. C.* § 7011 for activities the *pro se* appellants allege the applicant has undertaken without a required permit. Additionally, the disputed appeals include the assertion that, "The DNREC under John Hughes has consistently failed to defend CZA decisions at the judicial level, and have (sic) demonstrated an alarming incompetence and lack of understanding of CZA issues, including failing to appeal a clearly erroneous decision rendered by the CZICB in regard to the Delaware Terminal Company, issued February 12, 2004; and the recent illegally negotiated settlement with the Premcor Refinery, issued January 25, 2005."

The Board determined that the *pro se* appellants were not "aggrieved" by the Secretary's decision within the meaning of the statute. By a vote of 5-0 with the Chair abstaining, the Board granted the motions to dismiss.

On March 16, 2005, the Delaware Chapter of Sierra Club, Delaware Chapter of the Audubon Society and Delaware Nature Society filed a joint Motion to Intervene together with a Motion for the Admission *Pro Hac Vice* of Kenneth T. Kristl, Esq., to represent them in this matter. On March 17, 2005, John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty filed a Motion to Intervene.

The Board granted the Motion to Admit Mr. Krystl *pro hac vice*.

All proposed interveners conceded that permission to intervene is discretionary with the Board. Mr. Krystl argued, on behalf of his clients, that their intervention is necessary in order to preserve their right meaningfully to appeal a decision of the Board to the Superior Court because any Superior Court appeal is on the record. The Board determined that an adequate record would be created by the existing parties together with any statements and positions the proposed interveners might choose to make as members of the public. By a vote of 5-0, with the Chair abstaining, both motions to intervene were denied.

SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

Before the hearing, the Board had reviewed the record of proceedings below including Crown Landing LLC's Request for a Coastal Zone Status Decision with supporting factual and legal arguments, voluminous public comments, the Assessment and Recommendations of DNREC staff and the Decision dated February 3, 2005, from which the appeal is taken. The application seeks a status decision for a proposed new waterfront gasification facility for receiving and processing of liquefied natural gas (LNG). The proposed construction comprises a docking facility with an approximately 2,000-foot-long trestle pier providing a single berth designed to accommodate ships carrying LNG and a gasification plant located on land. The majority of the pier would be located within the State of Delaware, inside the coastal zone, and the remainder of the construction would be in the State of New Jersey. The application for a status decision and the status decision itself relate only to that portion of the proposed construction located in Delaware. The Secretary's decision that the proposed facility is prohibited by the Coastal Zone Act includes his rationale:

I find that your proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, I conclude that this facility, as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the on-shore tanks essential to the operation of the facility are prohibited structures.

The following witnesses were called by Crown Landing:

1. Lauren Segal, the Project Director for the Crown Landing project. Ms. Segal described the overall process of producing usable natural gas. The gas, which could come from wells virtually anywhere in the world, is chilled to liquid phase prior to being loaded onto ships which transport it to facilities such as the one proposed in this matter. Many contaminants of the gas are eliminated by the chilling process. At the proposed docking facility, the chilled liquid would be off-loaded and transferred through cryogenic pipes to tanks located on shore. Within the tanks, the liquid would be circulated. Also on shore, it would be diluted by the addition of small amounts of nitrogen if necessary to adjust the BTU content. The liquid then would be heated to gaseous phase and then pressurized before being transferred to transport pipelines. A small amount of odorizing substance, Mercaptan, necessary for safety, would be added before the gas is transported through the outgoing pipelines. Ms. Segal considers the process occurring after the LNG is removed from the ship to be manufacturing because it changes an unmarketable product into a marketable product.

Ms. Segal also presented testimony concerning the need for new LNG facilities, specifically in the Mid-Atlantic region, the suitability of the chosen site for an LNG facility and the steps taken by BP (Crown Landing

LLC's parent company) to ensure safety of the LNG ships while in the Delaware River and the safety of the facility as a whole.

In response to a question from the Board, Ms. Segal testified that it is her judgment that if the facility for unloading LNG were substantially distant from the proposed site, that site would not be useful as the gasification facility.

2. Laurie J. Beppler, Engineering Manager for the Crown Landing project. Ms. Beppler described, in greater detail, the construction and operation of the proposed facility. Ms. Beppler testified that LNG could not be transported safely overland to the site from an off-loading dock located some distance away. Rather, the dock and the land-based components of the facility must be considered an integrated facility. As had Ms Segal, Ms. Beppler testified that, in her judgment, the proposed site would not be useful as the gasification facility if it were substantially distant from the facility for unloading LNG.

3. Dr. Georges Melhem, Chair and Chief Engineer of ioMosaic Corporation, a company specializing in safety consulting services. Dr. Melhem testified that the product going into the distribution pipelines from the proposed facility would be a new product, not the same product that was on the ship, and therefore the onshore component meets the definition of a manufacturing facility.

Dr. Melhem also testified as to the similarities and differences between the proposed facility and one located on adjacent land. The adjacent facility, the Logan (formerly "Keystone") cogeneration plant, received a permit under the Act for a docking facility for the off-loading of coal that is subsequently burned to produce electricity. Dr. Melhem testified that the Logan facility has more characteristics of heavy industry than would the proposed Crown Landing facility and, therefore, he concludes that the proposed facility is not heavy industry.

4. Dr. William Fagerstrom, a professor in the Mechanical Engineering Department at the University of Delaware. Dr. Fagerstrom teaches a course in manufacturing and testified that, according to the definitions used in his class, the onshore component of the proposed Crown Landing construction is manufacturing. In particular, Dr. Fagerstrom pointed out that the nitrogen used to dilute the LNG is "manufactured" on site.

5. David Blaha, of Environmental Resources Management Group, Inc., an expert in evaluating the potential environmental impact of projects. He emphasized the superiority of LNG as a fuel, the greater potential for pollution of the Logan cogeneration plant and the appropriateness of the site selected for the Crown Landing facility, primarily because the facility could use waste heat from the Logan cogeneration plant.

DNREC called Dr. Stanley I. Sandler as its only witness. Dr. Sandler gave a written statement as well as live testimony. Dr. Sandler testified that the onshore component of the proposed facility would not manufacture a new product or transform in any significant way the natural gas off-loaded from a ship at the dock. To the extent that natural gas is processed in a meaningful context, that processing occurs at the well head as the gas is captured and chilled. The gas that would leave the ship at the dock is essentially the same product that would enter the distribution pipelines.

At least eleven members of the public were heard by the Board. Most of the testimony of these speakers was directed to the dangers, real or perceived, of an LNG facility and ships carrying LNG up the Delaware River due to vulnerability to intentional attack, catastrophic accident or other failures. In addition, many speakers' comments concerned negative impacts on neighboring communities such as the impact on recreation and on business efficiency.

One witness argued that the proposed facility is essentially identical to the Logan facility, is a necessary addition to the economy of the region and will ensure the availability of natural gas essential to the production of electricity as well as growth of important industry in the region. The possibility of as many as fifty new jobs in the region was mentioned.

Every witness who addressed the issue testified that the onshore component of the proposed construction includes some but not all characteristics of a "heavy industry" as defined by the Act. The evidence as a whole reveals a significant and unresolved issue as to the safety and potential to pollute of the facility and its ships which are essential to the operation of the facility.

The Board finds, as a matter of fact, that the onshore component of the proposed facility is not a "manufacturing" facility. Rather, the facility is a single, integrated facility the onshore component of which exists solely to support the offshore component. The real sole purpose of the proposed facility is to serve as a bulk product transfer facility. Furthermore, the proposed facility has many of the characteristics of heavy industry and there remain significant questions regarding the potential impact on adjacent communities.

CONCLUSIONS OF LAW

Both the provisions of the Coastal Zone Act (7 Del. C. Chapter 70), ("the Act") and the Regulations Governing Delaware's Coastal Zone adopted May 11, 1999, as amended, ("Regulations") are binding on this Board.

Section 7003 of the Act absolutely prohibits new bulk product transfer facilities in the coastal zone. The proposed construction is a bulk product transfer facility as defined by § 7002 of the Act unless it qualifies for the exception found in the second sentence thereof: "Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a

permit is granted or which is a nonconforming use."[1] The Regulations clarify this exception:

> The following uses or activities are permissible in the Coastal Zone by permit. Permits must be obtained prior to any land disturbing or construction activity.
>
> 1. The construction of pipelines or docking facilities serving as offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility. To be permissible under these regulations, the materials transferred through the pipeline or docking facilities must be used as a raw material in the manufacture of other products, or must be finished products being transported for delivery.

Regulations, § F. 1.

Thus construction that otherwise would be prohibited as a bulk product transfer facility is permissible if it includes two distinct components: (1) a docking facility or pier or pipelines and (2) one single permitted on-shore manufacturing or other facility which is served by the docking facility or pier or pipelines. "Docking Facility" is defined in the Regulations as follows:

> 6. "Docking Facility" means any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping,

---

[1] Although the onshore part of the proposed construction is to be located in New Jersey and, therefore, is not eligible for a permit under the Act, the Board considers the nature of the entire construction for purposes of this decision and considers a facility which would be eligible for a permit if located in Delaware to be a "facility for which a permit is granted. . . ."

storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment.

Regulations, § C.6.

The construction would be prohibited if the onshore component is heavy industry, since all new heavy industry is prohibited and ineligible for a permit. The Act defines "heavy industry" at § 7002(e) as follows:

"Heavy industry use" means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equipment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of

> offshore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.

DNREC and several public speakers argue that the Logan/Keystone cogeneration permit is not applicable precedent since that permit allowed the construction of a docking facility to serve an onshore component which properly is considered a manufacturing facility in that it consumes the off-loaded product (coal) and produces a different product (electricity) for distribution. In contrast, the proposed Crown Landing docking facility would serve an onshore component which would produce for distribution the same product (natural gas) that is off-loaded at the docking facility. DNREC argues that the more relevant precedent, cited by several public speakers, is the 1972 denial of a permit to El Paso Eastern Company for the construction of a pier in Delaware waters serving an LNG terminal in New Jersey. That denial, which was decided early in the history of the Act and predated the adoption of the Regulations, cites an analysis of the Act from the Attorney General which states, in part:

> It is quite clear that the legislative intent was to permit docking facilities where such facilities would benefit such industries as would be granted permits to operate in the Coastal Zone. Here the situation is reversed. The terminal will only exist as an adjunct to the docking facility. In other words, the important part of the project to El Paso Eastern is not the 'industrial facility' but the docking facility.

The Board finds a similar analysis applies to the proposed Crown Landing construction. Having found that the proposed construction is a single integrated facility for the bulk transfer of natural gas, the Board concludes, as a matter of law, that the entire proposed facility is a docking facility which does not support a manufacturing or other facility. Consequently, the proposed construction is

absolutely prohibited by the Act and no permit therefor may be issued.

BOARD'S DECISION

For the foregoing reasons, the Board, by a unanimous vote of the six members present, affirms the Secretary's decision and finds that the proposed construction is a use absolutely prohibited by the Coastal Zone Act.

/s/ CHRISTINE M. WAISANEN
Christine M. Waisanen,
Chair

/s/ JOHN ALLEN
John Allen
Board Member

/s/ PAUL BELL
Paul Bell
Board Member

/s/ ALBERT HOLMES
Albert Holmes
Board Member

/s/ PALLATHER SUBRAMANIAN
Pallather Subramanian
Board Member

/s/ VICTOR SINGER
Victor Singer
Board Member

Date: April 14, 2005

APPENDIX 2 - AFFIDAVIT OF R. PEDER HANSEN DATED OCTOBER 21, 2005

No. 11, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

AFFIDAVIT OF R. PEDER HANSEN IN OPPOSITION OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

STATE OF DELAWARE :
: SS
COUNTY OF KENT :

R. Peder Hansen, being duly sworn, deposes and says:

1. I am an Environmental Program Manager II in the Surface Water Discharges Section, Division of Water Resources, of the Delaware Department of Natural Resources and Environmental Control ("DNREC"), an agency of the State of Delaware. I have served as an Environmental Program Manager II in the Division of Water Resources since 1993. I am responsible for the review of all applications for discharges into the Delaware River, including discharges into the Delaware River within Delaware territory known as the Twelve Mile Circle. I

have knowledge of the matters set forth herein based upon my personal knowledge and upon my review of the DNREC files relating to the matters addressed below.

2. DNREC does not require that a New Jersey applicant who is seeking to discharge into the Delaware River from the New Jersey shore obtain a permit from both New Jersey and Delaware, even though the outfall may cross the boundary of New Jersey into Delaware within the Twelve Mile Circle. Delaware does not require DNREC permits for such discharges because the United States Environmental Protection Agency ("EPA") provides uniform minimum standards for discharges into the Delaware River under the federal Clean Water Act, 33 U.S.C.A. § 1251 *et seq.* (2005) ("CWA") and the National Pollution Discharge Elimination System ("NPDES") Program pursuant to 33 U.S.C.A. §§ 1311 and 1342(a) (2005).

3. Federally delegated discharge permitting authorities, such as Delaware and New Jersey, must obtain approval from the EPA to assure that minimum water quality discharge standards under the CWA are adopted as a component of any State permitting program that also serves as a Federal permit. See 40 C.F.R. § 123 *et seq.* Under federal regulations promulgated under NPDES, no permit for discharge may be issued when the imposition of permit conditions cannot ensure compliance with the applicable water quality requirements of all affected States. 40 C.F.R. § 122.4(d). Therefore, under 40 C.F.R. § 122.4(d), New Jersey may not issue a permit for discharge into the Delaware River within the Twelve Mile Circle unless Delaware water quality requirements are satisfied. Consequently, there is no reason for Delaware to issue a separate permit for discharges within the Twelve Mile Circle when the EPA requires New Jersey to satisfy Delaware's water quality standards.

4. Delaware also ensures compliance with Delaware's water quality standards for discharges through its participation in the Delaware River Basin Commission

("DRBC"). The DRBC exists pursuant to an interstate compact between Delaware, New Jersey, New York, and Pennsylvania, which constitute the States bordering the Delaware River. Del. Code Ann. tit. 7 § 6501. As a signatory to the Delaware River Basin Compact, Delaware appoints a representative who serves as a voting member of the DRBC. The DRBC receives notice of, and provides its own approval for, proposed discharges within the Delaware River basin, including proposed discharges within the Twelve Mile Circle. If New Jersey were to issue a permit for discharges into the Delaware River within the Twelve Mile Circle that did not conform to Delaware's water quality standards, Delaware could assure compliance with its water quality standards as an affected State through the DRBC permitting process.

5. In light of the avenues for assuring compliance with Delaware's water quality standards through federal law and the Delaware River Basin Compact, Delaware has chosen to avoid needless overregulation of water discharges from the New Jersey shore.

/s/ R. PEDER HANSEN
R. Peder Hansen

Subscribed And Sworn To
Before Me This 21st Day
Of October, 2005

/s/ LAURIE MOYER
Notary Public
Of The State Of Delaware

[Notary Stamp omitted]

APPENDIX 3 – AFFIDAVIT OF KEVIN P. MALONEY DATED OCTOBER 23, 2005

No. 11, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

AFFIDAVIT OF KEVIN P. MALONEY IN OPPOSITION OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

STATE OF DELAWARE :
: SS
COUNTY OF KENT :

Kevin P. Maloney, Esquire, being duly sworn, deposes and says:

1. I currently serve as a Deputy Attorney General for the State of Delaware. In that capacity I act as one of several counsel for the Delaware Department of Natural Resources and Environmental Control ("DNREC"). I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by DNREC.

2. Delaware first adopted a statute regulating the sale, lease, or easements to subaqueous public lands in 1961. 53 Del. Laws ch. 34. This statute was extended in 1964. 54 Del. Laws ch. 228. In 1966, Delaware adopted the Underwater Lands Act, which regulated, *inter alia*, the sale and lease of subaqueous lands. 55 Del. Laws ch. 442. In 1986, the Delaware General Assembly adopted a new Subaqueous Lands Act, which regulates public and private subaqueous lands within the State of Delaware. 65 Del. Laws ch. 508; Del. Code Ann. tit. 7 ch. 72.

3. Since 1961, when the first statute regulating the sale and lease of subaqueous lands in Delaware was adopted, Delaware has issued the following eleven subaqueous land leases and/or permits for use of Delaware's subaqueous lands within the Twelve Mile Circle for projects entering Delaware territory from the New Jersey shore.

4. On January 11, 1962, Delaware entered into a twenty-year subaqueous land lease allowing the SunOlin Chemical Company ("SunOlin") to use Delaware subaqueous soil within the Twelve Mile Circle to construct, maintain, repair, replace, renew and operate submarine pipelines across the Delaware River from Claymont, Delaware to Gloucester County, New Jersey. Delaware renewed this lease on November 14, 1981 for a period of ten years. This lease was again renewed on October 15, 1991 for a period of ten years, and on May 15, 2002 for a period of twenty years.

5. On October 9, 1963, Delaware entered into a ten-year subaqueous land lease allowing the Colonial Pipeline Company to use Delaware subaqueous soil within the Twelve Mile Circle near Logan Township New Jersey to construct, maintain, inspect, operate, renew, replace, repair, improve and remove submarine pipelines, from Claymont, Delaware to Logan Township, Gloucester County, New Jersey.

6. On or about September 29, 1971, Delaware granted a ten-year lease to allow E.I. du Pont de Nemours & Co., Inc. ("DuPont") to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers Works facility within the Twelve Mile Circle near the New Jersey shore, "without prejudice to the title claim of either party."

7. On March 18, 1982, Delaware granted permission to DuPont in Deepwater, New Jersey to repair and replace an existing 36 pile cluster in Delaware subaqueous soil within the Twelve Mile Circle.

8. On July 28, 1987, Delaware entered into a ten-year subaqueous lands lease allowing the Columbia Gas Transmission Corp. to construct a submerged natural gas pipeline across the Delaware River within the Twelve Mile Circle. The lease also allowed Columbia Gas to dredge 552 cubic yards of material from Delaware subaqueous lands. This lease was renewed on January 8, 1998.

9. On August 3, 1987, Delaware entered into a ten-year subaqueous lands lease allowing the Colonial Pipeline Company to construct a 30 inch submerged petroleum pipeline across the Delaware River within the Twelve Mile Circle, and dredge Delaware subaqueous lands.

10. On September 30, 1991, Delaware entered into a ten-year subaqueous land lease allowing Keystone Cogeneration Systems, Inc. ("Keystone") to dredge 40,000 cubic yards of material from the Delaware River within the Twelve Mile Circle to create a 910 feet by 150 feet barge berth. The lease also permitted Keystone to construct a coal unloading pier for a facility located in Logan Township, New Jersey. A twenty-year renewal of this lease was executed by the State of Delaware on November 9, 2001.

11. On February 7, 1996, the Delaware entered into a ten-year subaqueous land lease allowing the New Jersey

Department of Environmental Protection, Division of Parks and Forestry, to rehabilitate a pier and construct a new floating ferry dock on Delaware subaqueous soil within the Twelve Mile Circle near Fort Mott State Park in Salem County, New Jersey.

12. On December 9, 1997, Delaware entered into a ten-year subaqueous land lease allowing Delmarva Power and Light Company to install 3,755 linear feet of submarine fiber optic cable in the Delaware River within the Twelve Mile Circle extending from Pigeon Point in New Castle County, Delaware, to Deepwater Point in New Jersey. This lease was amended on March 11, 2002.

13. On May 4, 2001, Delaware issued a subaqueous lands permit to DuPont Chambers Works located near Deepwater, New Jersey, to allow DuPont to dredge approximately 4,650 cubic yards of material from the Delaware River within the Twelve Mile Circle, to backfill existing elevations on a 0.71 acre site in the Delaware River, and to install a temporary sheet pile wall surrounding the proposed excavation in the Delaware River.

14. On May 10, 2005, DNREC entered into a twenty-year subaqueous lands lease allowing Fenwick Commons, LLC, fill approximately 1,882 square feet of Delaware subaqueous lands at the Penns Grove Riverfront and Pier, in Penns Grove, New Jersey, in connection with the construction of a 40 foot wide by 750 foot long pier and related structures.

/s/ KEVIN P. MALONEY
Kevin P. Maloney

Subscribed And Sworn To
Before Me This 23rd Day
Of October, 2005

/s/ MAX B. WALTON
Notary Public
Of The State Of Delaware

APPENDIX 4

OPINIONS OF NEW JERSEY ATTORNEY GENERAL.
(1954 N.J. Op. Atty. Gen. 6)

February 2, 1954.

HON. CHARLES R. ERDMAN JR.
Commissioner, Department of Conservation and Economic Development
520 East State Street
Trenton, New Jersey

FORMAL OPINION 1954 — No. 3.

Dear Commissioner:

You have requested a formal opinion as to the legal authority of your Department, with respect to lands below low water mark in the Delaware River within the so-called twelve-mile Delaware Circle, (1) to make riparian grants and (2) to issue licenses and fix a charge for the dredging of bottom material pursuant to R. S. 12:3-22.

As you have noted, the decree of the United States Supreme Court entered June 3, 1935 in the Delaware boundary case (*N. J. v. Delaware*, 295 U. S. 694) fixed the boundary within the Delaware Circle at the mean low water line on the New Jersey side of Delaware River and this decree was made without prejudice to the rights of either state under the Compact of 1905, which was enacted in New Jersey as R. S. 52:28-34, et seq. The Compact provides generally for the service of civil and criminal process by either State upon any portion of the Delaware River, for the common enjoyment of fishing rights throughout the waters of said river between the low water marks on each side thereof, and for riparian jurisdiction. This last item is covered by Article VII, which reads as follows:

"Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." (L. 1905, c. 42, Art. VII, p. 71.)

Article VIII of the Compact reads:

"Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either state of, in or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." (L. 1905, c. 42, Art. VIII, p. 71.)

In my opinion, the State of New Jersey has by virtue of Article VII the complete and exclusive right to make grants and leases of riparian lands below low water mark on its side of the river.

In the first place, as was observed in the opinion of the United States Supreme Court in *New Jersey v. Delaware*, 291 U. S. 361, the State of Delaware has apparently never claimed to own the shore between high and low water mark on the New Jersey side; that part of the shore has always belonged to the State of New Jersey. *State v. Jersey City*, 25 N. J. L. 525, 527. Since New Jersey owned to low water mark in any event, the Article (VII) granting to each State the right to continue to exercise riparian jurisdiction of every kind and nature and to make grants and leases of riparian lands under its own laws would have had no meaning or purpose unless it applied to lands below the low water mark. An act of the Legislature should be so construed that, if it can be prevented, no part thereof shall be superfluous, void or insignificant. *Steel v. Freeholders of Passaic*, 89 N. J. L. 609, 612; *Ford Motor Company v. New Jersey Dept. of Labor and Industry*, 5 N. J. 494, 509.

In the next place, I am informed that two grants of land below low water mark were made by the predecessor of

your Navigation Bureau before the Compact of 1905 was entered into. It was also noted in the opinion of the Supreme Court in the Delaware boundary case (291 U. S. 361, 375) that the riparian proprietors on the New Jersey shore had for many years exercised dominion over the land below low water mark by building wharves and piers out into the river, in accordance with licenses or privileges granted by the State of New Jersey. When the Compact provided in Article VII that New Jersey on its own side of the river might "*continue* to exercise riparian jurisdiction of every kind and nature and to make grants, etc.," it obviously contemplated the continuance of the exercise of riparian jurisdiction as theretofore, including the making of grants for lands below low water mark.

I am further informed that since the yea 1905 thirty grants of such land have been made by the State of New Jersey, and that no claim has been made by the State of Delaware of any right to make riparian grants on the New Jersey side of the river. The practical construction thus placed by the parties upon the Compact in question, and adhered to by them for approximately fifty years, is entitled to great weight. *State v. Rogers*, 56 N. J. L. 480, 646; *Passarella v. Board of Commissioners*, 1 N. J. Super. 313, 320.

A contrary view would require a riparian owner who desired to acquire riparian lands below low water mark to undergo the cumbersome procedure of applying first to the State of New Jersey for a grant of the foreshore and then to the State of Delaware for a grant of the land below low water mark. "We cannot attribute to the Legislature a purpose so at variance with the common sense of the situation when the language used is susceptible of a construction in harmony with it." *Township Committee of Freehold Township v. Gelber*, 26 N. J. Super. 388, 391.

For these reasons we are convinced that by virtue of the Compact above referred to, the State of Delaware has given to the State of New Jersey the power to grant ripar-

ian lands adjacent to the New Jersey shore even though the title to said lands is in the State of Delaware.

As to your authority to issue licenses and fix a charge for the dredging of bottom material below low water mark, I am compelled to a different conclusion.

As we have seen, Article VIII of the Compact provides that nothing contained therein shall affect the rights of either State or the ownership of the subaqueous soil in the Delaware River except as set forth in the Compact; and the only exceptions made by the Compact to the jurisdiction of the State of Delaware over its territory in the Delaware River are the service of civil and criminal process, the common enjoyment of fishing rights, and the provisions of Article VII for the exercise of "riparian jurisdiction of every kind and nature" and the granting of "riparian lands and rights." Dredging and removing material from subaqueous soil (other than soil owned by a riparian proprietor) is not a riparian right, nor is the licensing of such activity an exercise of riparian jurisdiction. The word "riparian" is derived from the Latin word "ripa", which means "bank", and it is defined in Webster's Dictionary as "pertaining to * * * the bank of a river". Accordingly, the word "riparian" ordinarily refers to the bank and not the bed of the stream, and riparian rights are generally defined as those which grow out of the ownership of the banks, rather than the beds, of streams. *Gough v. Bell*, 22 N. J. L. 441, 464; *Rome Ry. & Light Co. v. Loeb*, 80 S. E. 785, 787, 141 Ga. 202; *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 123 N. E. 200, 202, 226 N. Y. 38; *cf. City of Paterson v. East Jersey Water Co.*, 74 N. J. Eq. 49, 63, aff'd, 77 N. J. Eq. 588.

Unlike the situation in respect to grants, New Jersey has never undertaken to issue licenses for dredging within the twelve-mile Circle. Moreover, R. S. 18:3-22 provides only for licenses to dredge or remove any deposits of sand or other material "from lands of the state" under tide waters. The lands below low water mark within

the twelve-mile Circle are not lands of this State, but lands of the State of Delaware.

In view of the foregoing, I find no authority for your Department to exercise the power in question with respect to the lands under discussion.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

APPENDIX 5

STATE OF DELAWARE
EXECUTIVE DEPARTMENT
PLANNING OFFICE
DOVER

RUSSELL W. PETERSON
GOVERNOR

DAVID R. KEIFER
DIRECTOR

February 23, 1972

Commissioner Richard Sullivan
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

Dear Commissioner Sullivan:

The Director of the State Planning Office has asked me to provide your Department with a copy of his status decision under terms of Delaware's Coastal Zone Act on the proposed pier for a liquified natural gas terminal of the El Paso Eastern Company planned for a site near Penns Grove, New Jersey.

I believe Mr. Keifer has spoken to you on the telephone about this project. He mentioned that perhaps you would bring this to the attention of Mr. Richard D. Goodenough of the Division of Marine Services.

If you have any questions or comments, please don't hesitate to call or write at any time.

Yours very truly,

/s/ JOHN SHERMAN
John Sherman
Planner III

JS/daf

Enclosure

APPENDIX 6

Office of the Attorney General
State of Delaware

Opinion No. 78-018
October 5, 1978

Nathan Hayward III
Director
Office of Management, Budget & Planning

QUESTIONS:

1. Does the exemption for docking facilities for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use, found in 7 Del. C. § 7002(f), apply to docking facilities that are located in the State of Delaware but serve an industry located in the State of New Jersey on the eastern side of the Delaware River?

2. Does the term "bulk products" as used in the Coastal Zone Act (a) refer to cargoes shipped in large bulk masses such as oil, gas, coal and iron ore; (b) also apply to cargoes of individually identifiable units such as container packets or items of machinery or goods?

ANSWER:

1. The exemption found in 7 Del. C. § 7002(f) applies to facilities that are located on the eastern boundary of Delaware which serve an industry located in New Jersey in the same context that it would apply if the attached facility were located on fast land in Delaware.

2. The term "bulk product" refers to cargoes shipped in large mingled masses and not to cargoes of individually packaged units or individual product items.

DISCUSSION:

The Coastal Zone Act, 7 Del. C. Chapter 70 (the "Act") was adopted in 1972 amid concerns regarding the future direction of development in the coastal area of Delaware. The explicit purpose was to regulate land use in the "most critical areas for the future of the state in terms of the quality of life in the State". 7 Del. C. § 7001. The same section declares that the public policy of the State of Delaware is to control the location, extent and type of industrial development in Delaware's coastal waters. The second purpose is to "better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism." *Id.* The remainder of that section makes it clear that the purpose is not to discourage industry but rather to protect the small critical area which comprises the coast of Delaware.

Water and air quality are a definite part of the environment sought to be protected by the General Assembly. 7 Del. C. § 7004(b)(1). The General Assembly has recognized, however, that an exemption for a single use facility would not interfere with the dual purposes of the Coastal Zone Act in such a way to be impermissable under the legislative purpose. 7 Del. C. § 7002(f). This section states:

"Bulk product transfer facility" means any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

The eastern boundary of the State of Delaware extends in part to the low water mark on the eastern side of the Delaware River within the 12 mile circle described from New Castle. 29 Del. C. § 201. If the development on the eastern rim of the state were to be uncontrolled by the

regulatory mechanism of the Coastal Zone Act, pressure of development antithetical to the Act would exist. As the Act states: "It is further determined that offshore bulk product transfer facilities represent a *significant danger* of pollution to the coastal zone and general pressure for the construction of industrial plants in the coastal zone . . . For these reasons, prohibition against bulk product transfer facilities in the coastal zone is deemed imperative." 7 Del. C. § 7001.

The question then becomes the extent to which these same rules apply where the adjacent facility is located in another jurisdiction over which the Delaware legislature has no authority. There is no reason to believe that the legislature intended any different rule to apply to unattached lands from the lands attached to the Delaware shore within the Coastal Zone. Allowing the bulk product transfer facilities to generate pressure for industry anywhere in the water and air basins would be contrary to the purposes of the Act. This would apply no less to that part of Delaware which is *located adjacent to New Jersey* than to the fast lands of Delaware itself.

Failure to apply the exemption to those facilities built adjacent to New Jersey would lead to an anomalous administration of the Act. The Act should not be read so as to produce an absurd result. *Opinion of the Justices*, Del. Supr., 295 A.2d 718 (1972) and *State v. Braun*, Del. Super, 378 A.2d 640 (1977).

As to the second question, the term "bulk" is defined in *Webster's Unabridged Dictionary* as "in a mass; loose; not enclosed in separate package or divided in separate parts". *Webster's Third New International Dictionary*, p. 293 (Ed. 1961). There are a number of cases in accord with the dictionary meaning of the word "bulk", thus it has been held to be "neither counted, weighed, nor measured", *Riggs v. State*, Neb. Supr., 121 NW 588 (1909); contra distinguished from "parcel", *Standard Oil v. Commonwealth*, Ky. Ct. App., 82 SW 1020 (1904); "of indefinite proportion", *Naftalin v. John Wood Co.*, Minn. Supr,

116 NW 2d 91 (1962). The term "laden in bulk" means loose in the hold or not included in boxes, bales or casks, *Standard Oil Co., supra*. The cited cases use the commercial definition of the term. Terms in a statute relating to trade or commerce are presumed to be used in their trade or commercial sense. 2A Sutherland, *Statutory Construction* (Sands 4th ed 1973) § 47.31. In this case, the commercial and the dictionary meaning are in accord. Therefore, the prohibition in 7 Del. C. § 7003 against offshore gas, liquid or solid bulk product transfer facilities would not refer to individual products or packages.

In summary, the State of Delaware should apply the exemption for the single use bulk product transfer facility in the same manner as if the attached facility were also located in Delaware. Therefore, if a permit would have been granted or if the facility would be a nonconforming use had the facility been located in Delaware, the single use exemption may apply. The term "bulk" refers to commingled goods and not to individual packages or products.

If you have any further questions, please feel free to call me.

Sincerely,

June D. MacArtor
Deputy Attorney General

APPROVED BY:

Richard R. Wier, Jr.
Attorney General

APPENDIX 7

NEW JERSEY COASTAL MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT

August 1980

Prepared by:

State of New Jersey
Department of Environmental Protection
Division of Coastal Resources
Bureau of Coastal Planning and Development
P.O. Box 1889
Trenton, New Jersey 08625

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
Office of Coastal Zone Management
3300 Whitehaven Street, N.W.
Washington, D.C. 20235

* * * * *

CHAPTER 2 BOUNDARY

Summary
Inland Boundary
Seaward and Interstate Boundaries

****

Summary

New Jersey's coastal zone extends from the New York border south to Cape May Point and then north to Trenton. It encompasses the waters and waterfronts of the Hudson River and related water bodies south to the Raritan Bay, the Atlantic Ocean and some inland areas from Sandy Hook to Cape May, the Delaware Bay and some inland areas, and the waterfront of the Delaware River and related tributaries.

The coastal zone encompasses areas in which the State, through the Department of Environmental Protection and the Hackensack Meadowlands Development Commission, has the authority to regulate land and water uses that have a significant impact on coastal waters. These authorities include the Coastal Area Facility Review Act (CAFRA), the Wetlands Act, the Waterfront Development Law, Tidelands statutes, and the Hackensack Meadowlands Reclamation and Development Act.

Inland Boundary

The inland boundary for the portion of the coast from Raritan Bay south to Cape May Point and then north along the Delaware Bay (consisting of parts of Middlesex, Monmouth, Ocean, Burlington, Atlantic, Cape May, Cumberland and Salem Counties), is defined as:

> the landward boundary of the Coastal Area as defined in the Coastal Area Facility Review Act (CAFRA, N.J.S.A. 13:19-4), or the upper boundary of

coastal wetlands located landward of the CAFRA boundary along tidal water courses flowing through the CAFRA area, whichever is more landward, including State-owned tidelands.

In the more developed portions of the State (including portions of Salem, Gloucester, Camden, Burlington, Mercer, Middlesex, Somerset, Union, Hudson, Essex, Passaic and Bergen Counties), the coastal zone boundary is defined as:

> the landward boundary of the State's jurisdiction under the Waterfront Development Act (N.J.S.A. 12:5-3)* or Wetlands Act (N.J.S.A. 13:9A-1), or the landward boundary of State-owned tidelands, whichever extends farthest inland.

This boundary (discussed below in "Principal Program Authorities") ensures that the State will regulate at least the first 100 feet inland from all tidal waters. The State will consider all land within 500 feet of tidal water to be within this boundary unless demonstrated otherwise. This represents a substantial reduction from the coastal zone boundary DEP proposed in several publications between December 1976 and March 1979, which would have extended the coastal zone inland to the first road or railroad, regardless of its distance from the water (See Appendix B).

The boundary of the Hackensack Meadowlands region is defined as:

> the boundary of the area defined as the Hackensack Meadowlands District by the Hackensack Meadowlands Reclamation and Development Act. (N.J.S.A. 13:17-4)

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* The definition of the inland jurisdictional boundary of the Waterfront Development Law is: the first public road, railroad right-of-way, or property line generally parallel to any navigable waterway, but in no case more than 500 feet or less than 100 feet inland from mean high water.

A generalized map of the Statewide Coastal Zone Boundary is shown in Figure 1 in Part I of this document, and Figure 2 is a sketch of the boundary in different parts of the State.

The boundary encompasses approximately 1,792 miles of tidal coastline, including 126 miles along the Atlantic Oceanfront from Sandy Hook to Cape May. It ranges in width from one hundred feet to twenty-four miles (near Batsto and the Mullica River, in Burlington County). The total land area of the Bay and Shore region is approximately 1,376 square miles or 17 percent of New Jersey's land area.

Research indicates that there has been a rising trend in the level of the ocean, relative to coastal land, along the northern East Coast of the United States. Hicks* data places the rise at about 8 inches between the 1890s and 1970. If this trend continues, tidal waters will penetrate further up the State's coastal rivers. Should this change become significant, the coastal zone boundary and the area under the jurisdiction of the Waterfront Development Law, will be redelineated accordingly.

Seaward and Interstate Boundaries

The seaward boundary of the coastal zone is the three nautical mile limit of the United States Territorial Sea, and the interstate boundaries of the States of New York and Delaware and the Commonwealth of Pennsylvania.

In most of Salem County, the Delaware – New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River. The New Jersey and Delaware Coastal Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water must obtain coastal permits from both states. New Jersey and

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* S.D. Hicks, "As the Oceans Rise", National Ocean Survey, NOAA, Vol. 2, No. 2, pp. 22-24, 1972.

Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs.

* * * * *

APPENDIX 8

Site Remediation Program
Office of Dredging and Sediment Technology
P.O. Box 028
Trenton, NJ 08625
(609) 292-1250
FAX (609) 777-1914

February 4, 2005

[Filed Stamp omitted]

Mr. David Blaha
Environmental Resources Management
200 Harry S. Truman Parkway Suite 400
Annapolis, MD 21401

RE: Deficiency Letter for Waterfront Development Application
File No. 0809-02-0011.1
Applicant: Crown Landing LLC
Project: Crown Landing LNG Import Terminal
Block: 101; Lot: 2
Location: Logan Township, Gloucester County

Dear Mr. Blaha:

The Office of Dredging and Sediment Technology (ODST) has reviewed the above referenced Waterfront Development Permit application received by the Department on January 7, 2005. Please be advised that the information submitted with your application has been reviewed and found to be deficient with respect to the Application Contents requirements found at N.J.A.C. 7:7 Chapter 7 and the Coastal Zone Management Rules N.J.A.C. 7:7E et. Seq. as detailed below.

In order to facilitate the review process this application should reference and/or include all related supporting materials such as the Resource Reports submitted to the federal Energy Regulatory Commission and other supporting information, which may be found in other reports or documents.

The project site is located in the States of Delaware and New Jersey. Accordingly, activities taking place from the mean low water line (MLWL) outshore are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations. Activities or associated impacts to New Jersey's coastal resources occurring from the MLWL landward are the subject of this application.

The project consists of the construction and operation of a liquefied natural gas (LNG) terminal in Logan Township, Gloucester County NJ. The proposed work entails: construction of berthing pier located in the Delaware River; approximately 800,000 cubic yards of associated dredging (in Delaware State waters) with disposal of dredged materials in New Jersey at the White's/Weeks Confined disposal facility (CDF) located in Logan Township. Other land-based constructions activities consist of three storage tanks with a combined storage capacity of 11.1 billion cubic feet of LNG with associated containment dikes; various buildings stormwater and parking facilities; and gas pipeline tie-ins.

This letter identifies the applicable sections of the respective CZM Rule, which are provided in Italics for reference. The text of the deficiency analysis shall appear in bold following each Rule.

SUBCHAPTER 3 - Special Area Rules

7:7E-3.5 Finfish Migratory Pathways

(a) Finfish migratory pathways are waterways (rivers, stream, creeks, bays and inlets) which can be determined to serve as passageways for diadromous fish to or from seasonal spawning areas, including juvenile anadromous fish which migrate in autumn and those listed by H.E. Zich (1977) "New Jersey Anadromous Fish Inventory" NJDEP Miscellaneous Report No. 41, and including those portions of the Hudson and Delaware Rivers within the coastal zone boundary.

1. *Species of concern include: alewife or river herring (Alosa pseudoharengus), blueback herring (Alosa sapidissima), American shad (Alosa aspidissima), striped bass (Monroe saxatilis), Atlantic sturgeon (Acipenser oxyrhynchus), Shortnose sturgeon (Acipenser brevirostrum) and American eel (Anguilla rostrata).*

(b) Development, such as dams, dikes, spillways, channelization, tide gates and intake pipes, which creates a physical barrier to the movement of fish along finfish migratory pathways is prohibited, unless acceptable mitigating measures such as fish ladders, erosion control, or oxygenation are used.

(c) Development which lowers water quality to such an extent as to interfere with the movement of fish along finfish migratory pathways or to violate State and Delaware River Basin Commission water quality standards is prohibited.

1. *Mitigating measures are required for any development which would result in: lowering dissolved oxygen levels, releasing toxic chemicals, raising ambient water temperature, impinging or suffocating fish, entrainment of fish eggs, larvae or juveniles, causing siltation, or raising turbidity levels during migration periods.*

The (ODST) is awaiting comments by the Division of Fish and Wildlife (DFGW) concerning project activities that may adversely affect finfish migratory pathways. The applicant has not discussed pile driving and related in-water construction activities which may generate noise which can interfere with the movement of fish along migratory pathways in the Delaware River. Clupids are known to be affected by hydroacoustic pulses associated with pile driving activities. Timing restrictions imposed upon the work, if approved, may suffice in addressing some impacts such as hydroacoustic affects. However, additional impacts associated with the withdraw of ballast water may have adverse impacts to ichoplankton and early life stages of Marine fish which occur in the Delaware River. These impacts and the requisite mitigate measures must be addressed to demonstrate compliances with this Rule.

Navigational Channels 7:7E-3.7

(a) Navigation channels include water areas in tidal rivers and bays presently maintained by the DEP or the Army Corps of Engineers and marked by US Coast Guard with buoys or stakes, as shown on NOAA/National Ocean Survey Charts: 12214, 12304, 12311, 12312, 12313, 12314, 12316, 12317, 12318, 12323, 12324, 12326, 12327, 12328, 12330, 12331, 12332, 12333, 12334, 12335, 12337, 12341, 12343, 12345, 12346, and 12363.

1. *Navigation channels also include channels marked with buoys, dolphins, and stakes, and maintained by the State of New Jersey, [and] access channels and anchorage's.*
2. *Navigation channels include all areas between the top of the channel slopes on either side.*

(b) Standards relevant to navigation channels are as follows:

1. *New or maintenance dredging of existing navigation channels is conditionally acceptable providing that the condition under the new or maintenance dredging rule is met (see N.J.A.C. 7:7E-4.2(f) and (g)).*

2. *Development which would cause terrestrial soil and shoreline erosion and siltation in navigation channels shall utilize appropriate mitigation measures.*

3. *Development which would result in loss of navigability is prohibited.*

4. *Any construction which would extend into a navigation channel is prohibited.*

5. *The placement of structures within 50 feet of any authorized navigation channel is discouraged, unless it can be demonstrated that the proposed structure will not hinder navigation.*

Based on information provided the ship berth site is over 1,500 feet away from the federal navigation channel. The applicant has not submitted, as part of this application, information concerning the cueing of ships waiting to dock at the facility and or associated tugboats which would tend the ships being docked and departing the dock. Additional information is required in the form of a plan drawn to scale depicting LNG and tender vessels in relation to the river channel, including turning radii and the route to and from the dockage position from the channel. In addition, the Department is awaiting review findings from the U.S. Coast Guard concerning impacts to navigation arising from the proposed Crown Landing LNG facility operation. These items must be addressed to demonstrate compliance with this Rule.

7:7E-3.15 Intertidal and Subtidal Shallows

(a) Intertidal and subtidal shallows means all permanently or temporarily submerged areas from the spring high water line to a depth of four feet below mean low water.

(b) Development, filling, new dredging or other disturbance is discouraged but may be permitted in accordance with (c), (d), (e), and (f) below and with N.J.A.C. 7:7E-4.2 through 4.20.

(c) New dredging in intertidal and subtidal shallows is discouraged, unless it complies with the following conditions:

1. There is a need for the proposed facility that requires the dredging that cannot be met by other similar facilities in reasonable proximity taking into account scope and purpose for the proposed facility;

2. There is no feasible alternative location for the proposed facility that requires the dredging, which would eliminate or reduce the amount of disturbance to intertidal and subtidal shallows without increasing impacts on other Special Areas; and

3. The proposed dredging and the facility that requires the dredging have been designed to minimize impacts to intertidal and subtidal shallows.

(d) Mitigation shall be required for the destruction of intertidal and subtidal shallows in accordance with (e) below. Mitigation proposals shall comply with the standards of N.J.A.C. 7:7E-3B. Mitigation shall not be required for the following:

1. Filling in accordance with N.J.A.C. 7:7E-4.10(c) and (e) 1, 2 and 3;
2. Maintenance dredging in accordance with N.J.A.C. 7:7E-4.6;
3. Beach nourishment in accordance with N.J.A.C. 7:7E-7.11(d);

4. *New Dredging in accordance with N.J.A.C. 7:7E-4.7 to a depth not to exceed four feet below mean low water; and*
5. *Construction of a replacement bulkhead in accordance with N.J.A.C. 7:7E-7.11(e)2i or ii.*

(e) Mitigation shall be required for the destruction of intertidal and subtidal shallows at a creation to last ratio of 1:1 through the creation of intertidal and subtidal shallows on the site of the destruction. For the purposes of this section, creation means excavating upland to establish the characteristics, habitat and functions of an intertidal and subtidal shallow. Where on-site creation is not feasible, mitigation shall be accomplished as follows:

2. *At a property other than a single family ;home or duplex property mitigation shall be performed in accordance with the following hierarchy:*

   i. *If on site creation of intertidal and subtidal shallows is not feasible, then mitigation shall be required at a creation to loss ratio of 1:1 through the creation of intertidal and subtidal shallows within the same 11-digit hydrologic unit code area, as defined at N.J.A.C. 7:7E-1.8, as the destruction;*
   ii. *If on site creation of intertidal and subtidal shallows is not feasible in accordance with (h)2i above, then mitigation shall be required at a creation to loss ratio of 1:1 through the creation of intertidal shallows within an adjacent 11-digit hydrologic unit code area within the same watershed management area, as defined at N.J.A.C. 7:7E-1.8, as the destruction. An adjacent 11-digit hydrologic unit code area is one which shares a common boundary at any point on the perimeter of the 11-digit hydrologic unit code area where the destruction is located;*
   iii. *If the creation of intertidal and subtidal shallows required in (h)2ii is not feasible, then mitigation*

shall be required at an enhancement to loss ratio of 2:1 through the enhancement of a wetland system which was previously more ecologically valuable but has become degraded due to factors such as siltation, impaired tidal circulation, or contamination, with hazardous substances (degraded wetland system) on the site of the destruction. For the purposes of this section, enhancement means actions performed to improve the characteristics, habitat and functions of an existing degraded wetland;

iv. If the enhancement of degraded wetlands required in (h)2iii above is not feasible, then mitigation shall be required at an enhancement to loss ratio of 2:1 through the enhancement of a degraded wetland system within the same 11-digit hydrologic unit code area as the destruction;

v. If the enhancement of degraded wetlands required in (h)2v above is not feasible, then mitigation shall be required in accordance with either of the following:

(1) Creation of intertidal and subtidal shallows at a creation to lost ratio of 1:1 within the same watershed management area; or

(2) Enhancement of degraded wetlands at an enhancement to loss ratio 2:1 within the same watershed management area.

Impacts to intertidal and subtidal shallows in the project site appear to have been minimized. Approximately 150 sq. Ft of impacts to intertidal and subtidal shallows are proposed associated with the construction of a stormwater outfall pipe. The applicant proposes mitigation for this activity in the adjacent Oldmans Creek. In addition, to the impacts associated the outfall pipe there would be impacts from the placement of pilings and other pier support members in the water and shallows areas. This is further discussed under the Filling

Rule referenced later in this document. The mitigation proposal should detail the location of the proposed mitigation site on a plan drawn to scale with an accompanying mitigation plan. Accordingly, please address this item by submitting a detailed mitigation discussion and site plan.

7:7E-3.23 Filled Water's Edge

(a) Filled water's edge areas are existing filled areas lying between wetlands or water areas, and either the upland limits of fill, or the first paved public road or railroad landward of the adjacent water area, whichever is closer to the water. Some existing or former dredged material disposal sites and excavation fill areas are filled water's edge (see Appendix, Figure 4, incorporated herein by reference).

(b) The "waterfront portion" is defined as a contiguous area at least equal at least equal in size to the area within 100 feet of navigable water, measured from the Mean High Water Line (MHWL). This contiguous area must be accessible to a public road and occupy at least 30 percent of its perimeter along the navigable water's edge.

(c) On filled water's edge sites with direct water access (that is, those sites without extensive inter-tidal shallows or wetlands between the upland and navigable water), development shall comply with the following:
1. The waterfront portion of the site shall be:
i. Developed with a water dependent use, as defined at N.J.A.C. 7:7E-1.8;
ii. Developed with an at-grade deck provided:

(1) The deck is open to the general public;
(2) The use of the deck is water oriented;
(3) The deck is not enclosed; and
(4) A public walkway is provided around the deck landward of the mean high water line at the water's edge; or
iii. Left undeveloped for future water dependent uses;

2. On the remaining non-waterfront portion of the site, provision of additional area devoted to water dependent or water-oriented uses may be required as a special case at locations which offer a particularly appropriate combination of natural features and opportunity for waterborne commerce and recreational boating; and

3. On large filled water's edge sites, of about 10 acres or more upland acres, where water-dependant and water-oriented uses can co-exist with other types of development, a greater mix of land uses may be acceptable or even desirable. In these cases, a ;reduced waterfront portion, that is, less than provided by a 100-foot setback, may be acceptable provided that non-water related uses do not adversely affect either access to or use of the waterfront portion of the site.

2. For sites with an existing or pre-existing water dependent use other than a marina, development that would reduce or adversely affect the area currently or recently devoted to the water dependent use is discouraged.

(f) In waterfront areas located outside of the CAFEA zone the water dependent use may be a public walkway, provided the upland walkway right-of-way is at least 30 feet wide, unless there are existing onsite physical constrains which cannot be removed or altered to meet this requirement.

(g) The development shall comply with the requirements for impervious cover and vegetative cover that apply to the site under N.J.A.C. 7:7E-5 and either N.J.A.C. 7:7E-5A or 5B.

(h) Along the Hudson River and in other portions of the Northern Waterfront and Delaware River Region, where water dependent uses are deemed infeasible, some part of the waterfront portion of the site may be acceptable for non-water dependent development under the following conditions:

1. The development proposal addresses, as a minimum, past use of the site as well as potential for future water dependent, commercial, transportation, recreation, and compatible maritime support services uses;
2. The developed land uses closest to the closest to the water's edge are water oriented;
3. Currently active maritime port and industrial land uses are preserved;
4. Adverse impacts on local residents and neighborhoods are mitigated to the maximum extent practicable; and
5. All other coastal rules are met.

(f) On all filled water's edge sites, development must comply with the Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11). Public access to the waterfront will not be required at single family or duplex residential lots along the waterfront, which are not part of a larger development.

This Rule applies to construction above the mean high water line; therefore upland elements of the Crown Point Terminal project are subject to this Rule. The applicant has indicated that this Rule is not applicable, however based on the site history, it appears the subject land areas were once waters, wetlands or tidelands that were filled via the placement of dredged materials. Therefore, this Rule is applicable and must be addressed. It is recognized that port facilities are water dependent and therefore the water dependent component of the project is met. However, the project does not address or provide the Public Address to the Waterfront as required by this Rule. Moreover, the applicant has requested a "waiver" of this requirement. While public access to the waterfront may not be appropriate at core areas of this site due to security concerns, access could be provided at other portions of the site or at off-site locations. This is discussed further at the Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11).

7:7E-3.27 Wetlands

This section of the Rule text has not been provided in this deficiency letter since there are companion Freshwater Wetlands permits pending with the Land Use Regulation Program. Notwithstanding the pending wetlands permits, the subject Waterfront Development Permit was not submitted with site development plans which depict the verified wetlands limits; associated buffer areas according to their respective resource classification and other plans as required by the Chapter 7 of the Coastal Permit Program Rules. Please supply all of the information indicated under Application Contents N.J.A.C. 7:7-4.2. Site plans must be supplied in accordance with sections 1 A through B and sections 1-10(f).

7:7E-3.28 Wetlands Buffers

Similar to the Wetlands Rule above, this section of the Rule has not been provided because there are companion Freshwater Wetlands Transition Area Waivers pending with the Land Use Regulation Program. As referenced above, however this application just include plans that detail buffers and transition area modifications in accordance with the Rule N.J.A.C. 7:7-4.2.

7:7E-3.38 Endangered or threatened wildlife or plant species habitats

(a) Endangered or threatened wildlife or plant species habitats are areas known to be inhabited on a seasonal or permanent basis by or to be critical at any stage in the life cycle of any wildlife or plan identified as "endangered" or "threatened" species on official Federal or State lists of endangered or threatened species, or under active consideration for State or Federal listing. The definition of endangered or threatened wildlife or plant species habitats in-

clude a sufficient buffer area to ensure continued survival of the population of the species. Absence of such a buffer area does not preclude an area from being endangered or threatened wildlife or plant species habitat.

1. Areas mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife (known hereafter as Landscape Maps) are subject to the requirements of this section unless excluded in accordance with (c)2 below. Buffer areas, which are part of the endangered or threatened wildlife species habitat, may extend beyond the mapped areas. The Department's Landscape Maps, with a listing of the endangered and threatened species within a specific area, are available from the Department's Division of Fish and Wildlife, Endangered and Nongame Species Program at the Division's web address, www.state.nj/us/dep/fgw/ensphome.

2. Information on the areas mapped as endangered or threatened plant species habitat on the Department's Landscape Maps and the occurrence of endangered or threatened plant species habitat is available from the Department's Office of Natural Lands Management, Natural Heritage Database at PO Box 404, Trenton, New Jersey 08625-0404,

3. The required endangered or threatened wildlife or plant species habitat buffer area shall be based upon the home range and habitat requirements of the species and the development's anticipated impacts on the species habitat.

(b) Development of endangered or threatened wildlife or plant species habitat is prohibited unless it can be demonstrated, through an Endangered or Threatened Wildlife or Plant Species Impact Assessment as described at N.J.A.C. 7:7E-3C2, that endangered or threatened wildlife or plant species habitat would not directly or through secondary impacts on the relevant site or in the surrounding area be adversely affected.

(c) Applicants for development of sites that contain or abut areas mapped as endangered or threatened wildlife species habitat on the Landscape Maps shall either:

1. Demonstrate compliance with this rule by conducting an Endangered or Threatened Wildlife Species Impact Assessment in accordance with N.J.A.C. 7:7E-3C2; or

2. Demonstrate that the proposed site is not endangered or threatened wildlife species habitat and this rule does not apply by conducting an Endangered or Threatened Wildlife Species Habitat Evaluation in accordance with N.J.A.C. 7:7E-3C3.

(d) If the Department becomes aware of an occurrence of an endangered or threatened wildlife species on a site that is not mapped as endangered or threatened plant species on a site that is not in the Natural Heritage Database, the Department will notify the applicant and the applicant shall demonstrate compliance with or inapplicability of this rule in accordance with (c) above.

(e) If the Department becomes aware of an occurrence of an endangered or threatened plant species on a site that is not in the Natural Heritage Database, the Department will notify the applicant and the applicant shall demonstrate compliance with this rule in accordance with (b) above.

(f) The Department is responsible for the promulgation of the official Endangered and Threatened Wildlife lists pursuant to the Endangered and Non-Game Species Conservation Act, N.J.S.A. 23:2A et seq. These lists include wildlife species officially listed as endangered and threatened in New Jersey as well as wildlife species officially listed as endangered or threatened pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531 et seq. Because the lists are periodically revised by the Department in accordance with N.J.S.A. 23:2A-1 et seq., the lists are not published as part of this rule. The lists are found at N.J.A.C. 7:25-4.13 and 7:25-4.17, the rules adopted pursuant to the Endangered and Non-Game Species Conservation Act. To obtain a copy of the most current Endangered and Threat-

ened Wildlife lists, please contact the Department , Division of Fish and Wildlife, Endangered and Nongame Species Program at the Division's web address, www.state.nj.us/dep/fgw/ensphome, or by writing to the Division at PO Box 400, Trenton, New Jersey 08625-0400.

(g) The Department is responsible for promulgation of the official Endangered Plant Species List pursuant to N.J.S.A. 13:1B-15. The Endangered Plant Species List, N.J.A.C. 7:5C-5.1, includes plant species determined by the Department to be endangered in the State as well as plant species determined by the Department to be endangered in the State as well as plant species officially listed as endangered or threatened or under active consideration for Federal listing as Endangered or Threatened. Because the Endangered Plant Species List is periodically revised based on new information documented by the Department, it is not published as part of this rule. To obtain the most current Endangered Plant Species List, please contact the Department, Division of Parks and Forestry, Office of Natural Land Management, PO Box 404, Trenton, NJ 08625-0404.

(h) For sites located within the Pinelands National Reserve and the Pinelands Protection Area, the plant species listed in the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-6:24) are also considered endangered or threatened plant species.

(i) Rationale: See OAL Note at the beginning of this chapter.

The subject site has been identified as containing exceptional resource value wetlands via a Letter of Interpretation issued by the Department. This determination is based upon the western riverine portion of the site area containing bald eagle foraging habitat. The applicant has discussed this Rule and proposes to mitigate for certain temporary and secondary impacts to endangered Bald Eagle forested riparian buffer habitats located along the

Delaware River. The mitigation is proposed via planting of a forested buffer along Oldmans Creek shoreline on the southern boundary of the site. In order to address compliance with this Rule the applicant must specifically quantify the impacted area; the proposed mitigation area; provide a time schedule for the anticipated impacted area and mitigation creation area and identify the mitigation area including a metes and bounds survey. In addition, Sections 3 b and c of this Rule requires that applicants for development of sites that contain or abut areas mapped as endangered or threatened wildlife species habitat on the Landscape Maps shall either:

1. "Demonstrate compliance with this rule by conducting an Endangered or Threatened Wildlife Species Impact Assessment in accordance with N.J.A.C. 7:7E-3C.2; or

2. Demonstrate that the proposed site is not endangered or threatened wildlife species Habitat and this rule does not apply by conducting an Endangered or Threatened Wildlife Species Habitat Evaluation in accordance with N.J.A.C. 7:7E-3C.3"

Since the applicant has acknowledged the presence of bald eagle habitat onsite a wildlife species impact assessment must be provided in accordance the Rule at N.J.A.C. 7:7E-3.38(3)(b)(1).

7:7E-3.39 Critical wildlife habitats

(a) Critical wildlife habitats are specific areas known to serve an essential role in Maintaining wildlife, particularly in wintering, breeding, and migrating.

1. Rookeries for colonial nesting birds, such as herons, egrets, ibis, terns, gulls, and skimmers; stopovers for migratory birds, such as the Cape May Point region; and natural corridors for wildlife movement merit a special

management approach through designation as a Special Area.

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2. Ecotones, or edges between two types of habitats, are a particularly valuable critical wildlife habitat. Many critical wildlife habitats, such as salt marsh water fowl wintering areas, and muskrat habitats, are singled out as water or water's edge areas.

3. Definitions and maps of critical wildlife habitats are currently available only for colonial waterbird habitat in the 1979 Aerial Colony Nesting Waterbird Survey for New Jersey (NJDEP, Division of Fish and Wildlife). Until additional maps are available, sites will be considered on a case-by-case basis by the Division of Fish Wildlife.

(b) Development that would directly or through secondary impacts on the relevant site or in the surrounding region adversely affect critical wildlife habitats is discouraged, unless:

1. Minimal feasible interference with the habitat can be demonstrated;

2. There is no prudent or feasible alternative location for the development; and

3. The proposal includes appropriate mitigation measures.

(c) The Department will review proposals on a case-by-case basis.

(d) Rationale: See the note at the beginning of this Chapter.

The applicant has discussed this Rule indirectly via 7:7E-3.38 Endangered or threatened wildlife or

plant species habitats. However, the applicant has not depicted the specific critical wildlife habitat areas on a construction or site development plan and provided the analysis required at section (b) 1-3 of this Rule. This information must be provided in order to demonstrate compliance with this Rule.

7:7E-4.4 Docks and piers for cargo and commercial fisheries

(a) Docks and piers for cargo and passenger movement and commercial fisheries are Structures supported on pilings driven into the bottom substrate or floating on the water surface, used for loading and unloading passengers or cargo, including fluids, connected to or associated with, a single industrial or manufacturing facility or to commercial fishing facilities.

(b) Docks and piers for cargo and passenger movement and commercial fisheries are conditionally acceptable provided:

1. The width and length of the dock or pier is limited to only what is necessary for the proposed use;

2. The dock or pier will not pose a hazard to navigation. A hazard to navigation includes all potential impediments to navigation, including access to adjacent moorings, water areas and docks and piers; and

3. The associated use of the adjacent land meets all applicable Coastal Zone Management rules.

(c) The standards for port uses are found at N.J.A.C. 7:7E-7.9. The standards for the construction of a dock or pier composed of fill and retaining structures are found at N.J.A.C. 7:7E4.10.

This Rule requires that the length and width of a dock or pier be limited to only what is necessary for the proposed use. Accordingly, information including engineering and design parameters, which generated the sizing of the dock structure has been minimized. For example, dimensions of piers at

other LNG facilities should be provided for comparison. The applicants' response to this Rule may be limited to the portions of the pier located in New Jersey.

7E-4.7 New dredging

(a) New dredging is the removal of sediments that does not meet the definition of Maintenance dredging at N.J.A.C. 7:7E-4.6.

(b) New dredging is conditionally acceptable in all General Water Areas for boat moorings, navigation channels or anchorages provided:

1. There is a demonstrated need that cannot be satisfied by existing facilities;

2. The facilities served by the new dredging satisfy the location requirements for Special Water's Edge Areas;

3. The adjacent water areas are currently used for recreational boating, commercial fishing or marine commerce;

4. The dredge area causes no significant disturbance to Special Water or Water's Edge Areas;

5. The adverse environmental impacts are minimized to the maximum extent feasible;

6. The dredge area is reduced to the minimum practical;

7. The maximum depth of the newly dredged area shall not exceed that of the connecting access or navigation channel necessary for the vessel passage to the bay or ocean;

8. Dredging will have no adverse impacts on groundwater resources;

9. NO dredging shall occur within 10 feet of any wetlands. The proposed slope from this 10 foot buffer to the nearest edge of the dredged area shall not exceed three vertical to one horizontal; and

10. Dredging shall be accomplished consistent with all of the following conditions, as appropriate to the dredging method:

i. An acceptable dredged material placement site with sufficient capacity will be used. (See N.J.A.C. 7:7E-4.8 Dredged material disposal in water areas, and N.J.A.C. 7:7E-7.12 Dredged material placement on land);

ii. Pre-dredged chemical and physical analysis of the dredged material and/or its elutriate may be required where the Department suspects contamination of sediments. Additional testing, such as bioaccumulation and bioassay testing of sediments, may also be required as needed to determine the acceptability of the proposed placement site for the dredged material. The results of these tests will be used to determine if contaminants may be resuspended at the dredging site and what methods may be needed to control their escape. The results will also be used to determine acceptability of the proposed dredged material placement method and site;

iii. Turbidity concentrations (that is, suspended sediments) and other water quality parameters at, downstream, and upstream of the dredging site, and slurry water overflows shall meet applicable State Surface Water Quality Standards at N.J.A.C. 7:9B. The Department may require the permittee to conduct biological, physical and chemical water quality monitoring before, during, and after dredging and disposal operations to ensure that water quality standards are not exceeded;

iv. If predicted water quality parameters are likely to exceed State Surface Water Quality Standards, or if predredging chemical analysis of dredged material or elutriate reveals significant contamination, then the Department will work cooperatively with the applicant to fashion acceptable control measures and will impose seasonal restrictions under the specific circumstances identified at (b)11vii below;

v. For new dredging using mechanical dredges such as clamshell bucked, dragline, grab, or ladders, deploying silt curtains at the dredging site may be required, if feasible based on site conditions. Where the use of silt curtains is infeasible, dredging using closed watertight buckets or lat-

eral digging buckets may be required. The Department may decide not to allow mechanical dredging of highly contaminated sites even if turbidity control measures were planned;

vi. For hydraulic dredges, specific operational procedures designed to minimize water quality impacts, such as removal of cutter head, flushing of pipeline sections prior to disconnection, or limitations on depth of successive cuts, may be required;

vii. The Department may authorized dredging on a seasonally restricted basis only, in waterways characterized by the following:

(1) Known spawning, wintering or nursery areas of shortnose sturgeons, winter flounder, Atlantic sturgeon, alewife, blueback herring, striped bass or blue crab;

(2) Water bodies downstream of known anadromous fish spawning sites under N.J.A.C. 7:7E-3.5 Finfish migratory pathways, where the predicted turbidity plume will encompass the entire cross-sectional area of the water body, thus forming a potential blockage to upstream migration;

(3) Areas of contaminated sediments with high levels of fecal coliform and/or streptococcus bacteria, and/or hazardous substances adjacent to (upstream or downstream) State approved shellfishing waters and public or private bathing beaches; or

(4) Areas within 1,000 meters or less of oyster beds as defined in N.J.A.C. 7:7E-3.2; and

viii. Side slopes shall not be steeper than 3:1 adjacent to wetlands to prevent undermining and/or sloughing of the wetlands.

(c) Propwash dredging, which is the movement of sediment by resuspending accumulated material by scouring the bottom with boat propellers or specially designed equipment with propellers is prohibited.

(d) New dredging or excavation to create new lagoons for residential development is prohibited in wetlands,

N.J.A.C. 7:7E-3.27, wetlands buffer, N.J.A.C. 7:7E-3.28, endangered or threatened wildlife or vegetation species habitats, N.J.A.C. 7:7E-3.38, and discouraged elsewhere.

(e) New dredging is conditionally acceptable to control siltation in lakes, ponds and reservoirs, provided that an acceptable sedimentation control plan is developed to address re-sedimentation of these water bodies.

(f) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, New Jersey, 08625-0420, (609) 777-1038.

(g) With the exception of N.J.A.C. 7:7E-4.7(b), (c), (d) and (e) above, new dredging is discouraged.

The dredging associated with this project is located outside of New Jersey's tidal waters, however, impacts associated with, or stemming from, dredging work are subject to State purview via certain CZM Rules. The applicant has indicated that this Rule is not applicable, however dredged material disposal via a hydraulic pipeline dredge is proposed within the State's boundary. Moreover, this application has been submitted without the requisite dredged material analysis as required by this Rule. Accordingly, a complete analytical report characterizing the subject sediment to be dredged must be submitted in order to address section 10 of this Rule. This material should be accompanied by the sediment core location plan that was approved by the Department. An evaluation of the data and determination of whether dredging impacts have been minimized will be made after review of pending comments from the Department's Division of Fish

and Wildlife; the National Marine Fisheries Service; the Federal Energy Regulatory Commission; the U.S. Coast Guard and other commenting agencies.

7:7E-4.8 Dredged material disposal

(a) Dredged material disposal is the discharge of sediments removed during dredging operations

(b) The standards relevant to dredged material disposal in water areas are as follows:

1. Dredged material disposal is prohibited in tidal guts, man-made harbors, medium rivers, creeks and streams, and lakes, ponds and reservoirs. Dredged material disposal is discouraged in open bays, semi-enclosed and backbays where the water depth is less than six feet;

2. Disposal of dredged materials in the ocean and bays deeper than six feet is conditionally acceptable provided that there is no feasible beneficial use or upland placement site available and it is in conformance with the USEPA and S Army Corps of Engineers Guidelines (40 C.F.R parts 220-228 and 230-232 and 33 CFR, parts 320-330 and 335-338) established under Section 404(b) of the Clean Water Act and the Evaluation of Dredged Material Proposed for Ocean Disposal Testing Manual, EPA-503/8-91/001, February 1991, and Evaluation of Dredged Material Proposed for Discharge in Inland and Near Costal Waters Testing Manual, EPA-000/0-93/000, May 1993, as appropriate to the proposed disposal site;

3. Dredged material disposal in water areas shall conform with applicable State Surface Water Quality Standards at N.J.A.C. 7:9B;

4. Overboard disposal (also known as aquatic, open water, side casting, subaqueous, or wet) of an uncontaminated sediments into unconfined disposal sites in existing anoxic dredge holes, shall comply with the following:

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i. Data on water quality, benthic productivity and seasonal finfish use demonstrate that the unconfined disposal site has limited biological value;

ii. All subaqueous dredged material disposal shall utilize best management techniques such as submerged elbows or underwater diffusers and may be limited to particular tidal cycle to further minimize impacts; and

iii. The hole shall not be filled higher than the depth of the surrounding waters.

5. Overboard disposal of sediments consisting of less than 90 percent sand shall be conditionally acceptable in unconfined disposal sites when shallow waters preclude removal to an upland or confined site. Such disposal shall comply with the following:

i. Shall fish Habitats (as defined in N.J.A.C. 7:&E-3.2) are not within 1,000 meters;

ii. Disposal will not smother or cause condemnation or contamination of harvestable shellfish resources (as in N.J.A.C 7:7E-3.2);

iii. Sediment characteristics of the dredged material and disposal site are similar; and

6. Uncontaminated dredged sediments with 75 percent sand or greater are generally encouraged for beach nourishment.

(c) The standards for dredged material placement on land are found at N.J.A.C 7:7E-7.12.

(d) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The

manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, new Jersey, 08625-0420, (609) 777-1038.

(e) Rationale: See the note at the beginning of this Chapter.

This Rule principally addresses dredge material disposal in water areas. Please refer to the Rule at N.J.A.C 7:7E-7.12 – Dredged Material Placement on Land discussed later in the letter.

7:7E-4.10 Filling

(a) Filling is the deposition of material including, but not limited to, sand, soil, earth and dredged material, into water areas for the purpose of raising water bottom elevations to create land areas.

(b) Filling is prohibited in lakes, ponds, reservoirs and open by areas at greater than 18 feet as defined at N.J.A.C 7:7-E4.1, unless the filling is consistent with the Freshwater Wetlands Protection Act (N.J.A.C. 13:9B-1 et seq.) and Freshwater Wetlands.

Approximately 340-sq. ft. of fill for the construction of a storm water outfall structure is proposed. In addition, an unspecified amount of fill will result from the piles that will support the proposed dock. The area of disturbance to waters, intertidal and subtidal shallows associated with the pilings and other pier supports must be quantified and mitigated. Accordingly, compliance with Rule must be demonstrated by suitable mitigations for the subject fills.

7:7E-4.14 Submerged pipelines

(a) Submerged pipelines (pipelines) are underwater pipelines which transmit liquids or gas, including crude oil, natural gas, water petroleum products or sewerage.

(b) Submerged pipelines are conditionally acceptable provided:

1. The pipelines are not sited within Special Areas, unless no prudent and feasible alternate route exists;

2. Directional drilling is used unless it is demonstrated that the sue of directional drilling is not feasible;

3. The pipeline is buried to a sufficient depth to avoid exposure or hazard;

4. All trenches are backfilled to preconstruction depth with natural occurring sediment; and

5. The proposed developments has been designed to minimize the impacts to the water area.

(c) Rationale: See the note at the beginning of this Chapter.

The applicant proposes to hydraulically convey dredged material to an off-site disposal location via pipeline. This Rule has not been fully addressed as no details have been given concerning this activity. Specifically, the rout and location of the pipe must be given as well details of its size and method of traverse (i.e., suspended, submerged) must be provided. Based on a review of river chards the length of the pipeline will exceed 3.5 miles and the pipeline will cross outshore of Raccoon Creek. Since the pipe will be located in and will cross navigable waters, it must be routed so that it will not interfere with navigation. In addition, the applicant has not been identified if the pipe will traverse wetlands, buffers and other Special areas as it makes landfall. Finally, this dredge pipeline will convey a very large quantity of dredge slurry, which may contain contaminants. Accordingly, a discussion along with supporting pipeline specifications must be provided demonstrating that the pipeline will be deployed and maintained such that it will not release or leak slurry into the river or wetlands. Moreover, plan should be provided for the detection of any leaks in submerged portions of the pipe. In addition, since the project calls for ongoing maintenance dredging, the applicant must identify

the method and details of future dredging cycles. If a hydraulic pipeline dredge will be used for subsequent operations the duration of work and effects of the pipeline route must also be addressed.

SUBCHAPTER 5

IMPERVIOUS COVER LIMITS AND VEGETATIVE COVER PERCENTAGES IN THE UPLAND WATERFRONT DEVELOPMENT AREA

7:7E-5A.1 Purpose and Scope

This subchapter sets the impervious cover limits and vegetative cover percentages for sites in the upland waterfront development area, as defined at N.J.A.C. 7:7E-5.2. For a site in the upland waterfront development area, impervious cover limits and vegetative cover percentages are based on the growth rating, environmental sensitivity, and development potential, and on whether the site is forested or unforested.

7:7E-5A.2 Upland waterfront development area regions and growth ratings

(a) The growth rating for a site in the upland waterfront development area is determined by the region in which it is located, and the growth rating assigned to that region.

(b) The growth ratings are as follows:

1. A development growth rating is assigned to regions of the upland waterfront development area that are already largely developed. Development in regions with this growth rating is preferred over development in regions with limited growth and extension growth ratings;

(c) The eight different regions and their growth ratings are based on their respective patterns of development and cultural and natural resources.

(d) The regions are as follows:

7. The Delaware River region, which is:

i. The land within the upland waterfront development area in the municipalities of Bridgeton and Millville in Cumberland County and Salem in Salem County; and

ii. The land within the upland waterfront development area in Salem County (but not located in the Delaware estuary region), and extending north from Salem County through Gloucester County, Camden County, Burlington County (but not located in Bass River Township), and Mercer County; and

8. The Delaware estuary region, which is:

i. The land within the upland waterfront development area in Cumberland County (but not located in the municipalities of Bridgeton and Millville); and

ii. The land within the upland waterfront development area in Salem County that is south and east of a boundary formed by Interstate 295 from its intersection with the New Jersey Turnpike to County Route 641; County Route 641 from its intersection with the New Jersey Turnpike to U.S. Route 130; U.S. Route 130 from its intersection with County Route 641 to its intersection with Oldmans Creek (but not located within the municipality of Salem).

(e) The growth ratings assigned to the regions described in (d) above are as follows:

1. The following regions are assigned a development growth rating:

i. Urban area region;

ii. Northern waterfront region; and

iii. Delaware River region;

2. The following regions are assigned an extension growth rating:

i. Western ocean region; and

ii. Southern region; and

3. The following regions are assigned a limited growth rating:

i. Western ocean region; and

ii. Great Egg Harbor River region; and

iii. Delaware estuary region.

7:7E-5A.3 Environmental sensitivity

(a) The environmental sensitivity of a site is based on the soil type and the depth to seasonal high water table or the presence of paving or structures. Different portions of a site may have different environmental sensitivities.

(b) A site or portion of a site has a high environmental sensitivity if it has wet or high permeability moist soils.

1. Wet or high permeability moist soils are soils with a depth to seasonal high water table of three feet or less, unless the soils are loamy sand or coarser as defined by the United States Department of Agriculture's Soil Texture Triangle, in which case they are soils with a depth to seasonal high water table of four feet or less.

(c) A site or portion of a site has a medium environmental sensitivity if it has neither a high environmental sensitivity nor a low environmental sensitivity.

(d) A site or portion of a site has a low environmental sensitivity if the depth to seasonal high water table is greater than five feet, or the site or portion of the site has paving or structures at the time the application is submitted.

7:7E-5A.4 Development potential

(a) Development potential is determined by the type of development proposed and the presence or absence of certain development-oriented elements at or near the site of the proposed development, including roads; wastewater conveyance, treatment and disposal system; and existing development. Development potential may be high, medium or low, as determined under N.J.A.C. 7:7E-5A.5 through 5A.7. A single development potential applies to an entire site.

(b) If a development proposed on a site is inconsistent with the applicable Areawide Water Quality Management Plan

adopted under N.J.A.C. 7:15, the development potential cannot be determined for the site. Any development that is inconsistent with the applicable Areawide Water Quality Management Plan is prohibited under N.J.A.C. 7:7E-8.4(b).

(c) The types of development are:

2. Major commercial or industrial development, which includes all industrial development, warehouses, offices, manufacturing plants, energy facilities, wholesale and major shopping centers with more than 100,000 square feet of enclosed building area, and major parking facilities with more than 700 parking spaces. For the purposes of this section and N.J.A.C. 7:7E-5A.6, major commercial or industrial development also includes solid waste facilities and wastewater treatment plants; and

3. Campground development, which provides facilities for visitors to enjoy the natural resources of the State. Typically, this type of development is suited to sites somewhat isolated from other development and with access to water, beach, forest and other natural amenities.

(d) The development potential for a site shall be determined as follows:

1. If a proposed development is a residential or minor commercial development as described at (b)1 above, the development potential for the site is determined under N.J.A.C. 7:7E-5A.5;

2. If a proposed development is a major commercial or industrial development as described at (b)2 above, the development potential for the site is determined under N.J.A.C. 7:7E-5A.6; and

7:7E-5A.6 Development potential for a major commercial or industrial development site

(a) Subject to the limitations at N.J.A.C. 7:7E-5A.4(c)4, the development potential for a major commercial or industrial development site is determined under (b) through (d) below.

(b) A site upon which a major commercial or industrial development is proposed is a high development potential site if it meets all of the requirements at (b)1 through 4 below:

1. An existing paved public road abuts the site;

2. If an offsite wastewater conveyance, treatment and disposal system is to be used:

i. The existing conveyance component of the system abuts the site; and

ii. The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity;

3. A part of the perimeter of the site is adjacent to, or immediately across a paved road from, existing major commercial or industrial development, or, in a region with a development growth rating, the site is adjacent to or immediately across a paved road from any existing commercial development; and

4. In a region with a limited growth or extension growth rating, the site is located either:

i. For a major commercial development, within two miles of an existing intersection with a limited access highway; or

ii. For an industrial development, either within:

(1) Two miles of an existing intersection with a limited access highway; or

(2) One-half mile of a freight rail line that shall be used, or the applicant has a written agreement with the owner of a freight rail line to obtain freight rail service directly to the site.

(c) A site upon which a major commercial or industrial development is proposed is a medium development potential site if it is not a high development potential site under

(b) above but does meet the requirements at either (c)1 or 2 below:

1. The site is located in a region with a development growth rating and the site is located;

i. One thousand feet or less from the nearest existing paved public road that is approved and shall be constructed before or concurrently with the development;

ii. If an offsite wastewater conveyance, treatment and disposal system is to be used, 1,000 feet or less from the conveyance component of that system, or 1,000 feet or less from the conveyance component of a system that is approved and shall be constructed before or concurrently with the development, provided:

(1) The wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity; and

iii. For an industrial development, one-half mile or less from the nearest existing commercial or industrial development that has more than 50,000 square feet of enclosed building areas within a single facility; or

2. The site is located in a region with limited growth or extension growth rating and the site is located:

i. Either 1,000 feet or less from the nearest existing paved public road, or five miles or less from the nearest intersection with a limited access highway;

ii. If an offsite wastewater conveyance, treatment and disposal system is to be used, 1,000 feet or less from the existing conveyance component of the system, provided:

(1) The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity; and

iii. One-half mile or less from the nearest commercial or industrial development that has more than 50,000 square feet of enclosed building area within a single facility.

(d) A site upon which a major commercial or industrial development is proposed is a low development potential site if it is neither a high development potential site under (b) above nor a medium development potential site under (c) above.

(1) The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity;

iii. If a commercial development is proposed, one-half mile or less from the nearest existing commercial or industrial development that has more than 20,000 square feet of enclosed building area within a single facility; and

iv. If a residential development is proposed, one-half mile or less from developed land, as described at (b)3 above.

(d) A site upon which a residential or minor commercial development is proposed is a low development potential site if it is neither a high development potential site under (b) above nor a medium development potential site under (c) above.

7:7E-5A.6 Development potential for a major commercial or industrial development site

(a) Subject to the limitations at N.J.A.C 7:7E-5A.4(c)4, the development potential for a major commercial or industrial development site is determined under (b) through (d) below.

(b) A site upon which a major commercial or industrial development is proposed is a high development potential site if it meets all of the requirements a (b)1 through 4 below:

1. An existing paved public road abuts the site;

2. If an offsite wastewater conveyance, treatment and disposal system is to be used:

i. The existing conveyance component of the system abuts the site; and

ii. The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity;

3. A part of the perimeter of the site is adjacent to, or immediately across a paved road from, existing major commercial or industrial development, or, in a region with a development growth rating, the site is adjacent to or immediately across a paved road from any existing commercial development; and

4. In a region with a limited growth or extension growth rating, the site is located either:

i. For a major commercial development, within two miles of an existing intersection with a limited access highway; or

ii. For an industrial development, either within:

(1) Two miles of an existing intersection with a limited access highway; or

(2) One-half mile of a freight rail line that shall be used, or the applicant has a written agreement with the owner of a freight line to obtain freight rail service directly to the site.

(c) A site upon which a major commercial or industrial development is proposed is a medium development potential site if it is not a high development potential site under (b) above but does meet the requirements at either (c)1 or 2 below:

1. The site is located in a region with a development growth rating and the site is located:

i. One thousand feet or less fro the nearest existing paved public road, or 1,000 feet or less from the nearest public

road that is approved and shall be constructed before or concurrently with the development;

ii. If an offsite wastewater conveyance, treatment and disposal system is to be used, 1,000 feet or less from the conveyance component of that system, or 1,000 feet or less from the conveyance component of a system that is approved and shall be constructed before or concurrently with the development, provided:

(1) The wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity; and

iii. For an industrial development, one-half mile or less from the nearest existing commercial or industrial development that has more than 50,000 square feet of enclosed building area within a single facility; or

2. The site is located in a region with a limited growth or extension growth rating and the site is located:

i. Either 1,000 feet or less from the nearest existing paved public road, or five miles or less from the nearest intersection with a limited access highway;

ii. If an offsite wastewater conveyance, treatment and disposal system is to be used, 1,000 feet or less from the existing conveyance component of the system, provided:

(1) The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant ahs an agreement with the sewage authority to modify the system to provide adequate capacity; and

iii. One-half mile or less from the nearest commercial or industrial development that has more than 50,000 square feet of enclosed building area within a single facility.

(d) A site upon which a major commercial or industrial development is proposed is a low development potential site if it is neither a high development potential site under

(b) above nor a medium development potential site under (c) above.

7:7E-5A.8 Development intensity

(a) The development intensity for a site is based on growth rating, environmental sensitivity, and development potential. Tables A through C are used to determine the development intensity of a site or portion of a site. Because environmental sensitivity may be different for different portions of a site, development intensity can also be different for different portions of a site.

(b) To determine the development intensity for a site:

1. Determine the growth rating for the site under N.J.A.C. 7:7E-5A.2;

2. Determine the environmental sensitivity for each portion of the site under N.J.A.C. 7:7E-5A.3;

3. Determine the development potential for the site based on the site and the type of development under N.J.A.C. 7:7E-5A.4 through 5A.7;

4. Consult Table A, B, or C below as follows:

i. For a site with a development growth rating, consult Table A; (See Attachment A)

The applicant has reported that the Crown Landing site is comprised of a total land area of 162.4 acres within the waterfront development area. The net land area reported (subtracting wetlands and wetlands transition areas) is 37.9 acres. The growth area of the site is the Delaware River Region, and therefore it is a designated Development Region for Coastal growth.

The Environmental Sensitivity of the site is derived based on soil types and their respective depths to the seasonal high water tables. The applicant has determined the site as containing two environmental sensitivities based on seasonal high water table levels. However, the applicant has not pro-

vided the pezometers or core logs which where used to determine the environmental sensitivity of the site. Furthermore, the extent of the 26.9 acres of medium environmental sensitive area and 11.0 acres of high sensitivity areas were not delineated and shown on a site development plan. This section of the Rule and supporting data establish the criteria for which the development intensity and allowable impervious cover limits are based. Therefore, this information bust be elucidated and provided in order to enable the Department to determine compliance with this Rule.

In addition, section 7:7E-5A.10 Vegetative Cover Percentages for a Site in the Upland Waterfront Development Area requires that trees and or herb/shrub vegetation shall be planted or preserved on-site. This section of the Rules was not addressed in the statement of compliance. Accordingly, this section of the Rule must be addressed via an analysis of the Vegetative Cover Percentages and submitted with the calculations.

7:7E-7.4 Energy facility use rule

(a) Energy facilities include facilities, plants or operations for the production, conversion, exploration, development, distribution, extraction, processing, or storage of energy or fossil fuels. Energy facilities also include onshore support bases and marine terminals. Energy facilities do not include operations conducted by a retail dealer, such as a gas station, which is considered a commercial development.

(b) Standards relevant to siting of new energy facilities, including all associated development activities, are as follows:

1. Energy facilities shall not be sited in Special Areas as defined at N.J.A.C. 7:7E-3.1 through 3.42, 3.44, 3.46, and marine fish and fisheries areas defined at N.J.A.C 7:7E-

8.2, unless site-specific information demonstrates that such facilities will not result in adverse impacts to these areas;

2. Except for water dependent energy facilities, energy facilities shall be sited at least 500 feet inland of the mean high water line of tidal waters in the following areas:

i. The CAFRA area; and

ii. The Western Ocean, Southern, Mullica-Southern Ocean, Great Egg Harbor River and Delaware Estuary regions, as defined at N.J.A.C. 7:7E-5A.2(d);

3. Public access to and use of the waterfront and tidal waters shall be maintained and, where feasible, enhanced in the siting of energy facilities, pursuant to N.J.A.C. 7:7E-8.11; and

4. The scenic and visual qualities of coastal areas shall be maintained as important public resources in the siting of energy facilities, pursuant to N.J.A.C. 7:7E-8.12.

(c) Coastal energy facilities construction and operation shall not directly or indirectly result in net loss of employment in the State for any single year.

1. Coastal energy facility construction and operation which results in loss of 200 or more person-years of employment in jobs in New Jersey directly or indirectly related to the State's coastal tourism industry in any single year is prohibited.

2. Rationale: See note at the beginning of this Chapter.

(i) Standards relevant to pipelines and associated facilities are as follows:

1. Crude oil and natural gas pipelines to bring hydrocarbons from offshore of the New Jersey coast to existing refineries, oil and gas transmission and distribution systems, and other new oil and natural gas pipelines are conditionally acceptable, provided:

i. For safety an conservation of resources, the number of pipeline corridors, including trunk pipelines for natural gas and oil, shall be limited, to the maximum extent feasi-

ble, and designated following appropriate study and analysis by interested Federal, State and local agencies, affected industries, and the general public;

Standards relevant to call processing plants are as follows:

1. A "gas processing plant" is designed to recover liquefiable hydrocarbons from a gas stream before it enters a commercial transmission line. A gas processing facility may include treatment, recovery and fractionation equipment to separate the recovered liquid hydrocarbon stream into its various components including, for example, ethane, butane and propane.

2. Gas processing plants proposed for locations between the offshore pipeline landfall and interstate natural gas transmission lines shall be prohibited from sites within the CAFRA area and shall be located the maximum distance from the shoreline. The siting of gas processing plants will be reviewed in terms of the total pipeline routing system.

3. Rationale: See the note at the beginning of this Chapter.

(n) Standards relevant to other gas-related facilities are as follows:

1. Additional facilities related to a natural gas pipeline such as metering and regulating stations, odorization plants, and block valves are conditionally acceptable in the CAFRA area if adequate visual, sound, and vegetative buffer areas are provided.

2. Rationale: See the note at the beginning of this Chapter.

(p) Standards relevant to storage of crude oil, gases and other potentially hazardous liquid substances are as follows:

1. The storage of crude oil, gases and other potentially hazardous liquid substances as defined in N.J.A.C. 7:1E-1.1 under the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.) is prohibited on barrier islands and discouraged elsewhere in the CAFRA area.

2. The storage of crude oil, gases and other potentially hazardous liquid substances is conditionally acceptable in the Urban Area, Northern Waterfront and Delaware River regions if it is compatible with or adequately buffered from surrounding uses.

3. The storage of crude oil, gases and other potentially hazardous liquid substances is not acceptable where it would limit or conflict with a potential recreational use.

4. The storage of crude oil, gases and other potentially hazardous liquid substances is not acceptable along the water's edge unless the storage facility is supplied by ship, in which case it is acceptable on the filled water's edge provided the storage facility complies with (p)1, 2, and 3 above.

5. Rationale: See the note at the beginning of this Chapter.

(q) Standards relevant to tanker terminals are as follows:

1. New or expanded tanker facilities are acceptable only in existing ports and harbors where the required channel depths exist to accommodate tankers.

i. Multi-company use of existing and new tanker terminals is encouraged in the Port of New York and New Jersey and the Port of Camden and Philadelphia, where adequate infrastructure exists to accommodate the secondary impacts which may be generated by such terminals, such as processing and storage facilities.

2. New tanker terminals are discouraged in areas not identified in (q)1 above.

3. Offshore tanker terminals and deepwater ports are discouraged.

4. Rationale: See the note at the beginning of this Chapter.

(s) Standards relevant to liquefied natural gas (LNG) facilities are as follows:

1. New marine terminals and associated facilities that receive, store, and vaporize liquefied natural gas for transmission by pipeline are discouraged in the coastal zone

unless a clear and precise justification for such facilities exists in the national interest; the proposed facility is located an constructed so as to neither unduly endanger human life and property, nor otherwise impair the public health, safety and welfare, as required by N.J.S.A. 13:19-10f; and such facilities comply wit the Coastal Zone Management rules.

i. LNG facilities shall be sited and operated in accordance with the standards set forth in the Natural Gas Act of 1938, 15U.S.C. 717-717x, the Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432, the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 et seq., the Energy Policy Act of 1992, P.L. 102-486, 106 Stat. 2776, October 24, 1992, and the National Environmental Policy Act, 42 U.S.C. 4321 et seq., which set forth standards for siting, design, installation, inspection, testing, construction, operation, transportation of gas, replacement, and maintenance facilities.

ii. In determining the acceptability of proposed LNG facilities the Department will consider siting criteria including but not limited to:

(1) The risks inherent in tinkering LNG along New Jersey's waterways;

(2) The risks inherent in transferring LNG onshore; and

(3) The compatibility of the facility with surrounding land uses, population densities, and concentrations of commercial or industrial activity.

iii. New LNG facilities that liquefy, store and vaporize LNG to serve demand during peak periods shall be located in generally remote, rural, and low-density areas where land use controls and/or buffer zones are likely to be maintained.

The Compliance Statement supplied by applicant refers to sections of other documents such as the numerous Resource Reports. Supporting documents should be referenced or attached to facilitate agency and public review. In accordance with this Rule a detailed analysis specific to the LNG opera-

tion in New Jersey, the must be provided to enable the Department to determine compliance with section S (II) 1, 2, 3 this Rule. This must include a demonstration that the storage and vaporizing facilities be located in areas where land use controls and or buffer zones are likely to be maintained. This information would be best supported by a zoning analysis and other land use parameters. In addition, the following items from the Crown Landing LLNG Project Resource Report 11 - Safety and Reliability and other referenced documents must be provided and or addressed:

1. Page 11-12 – please provide the Resource Report 13 (Additional Information Related to LNG Plants).
2. Page 11-15 – provide a mapping of the calculated or modeled Thermal Exclusion Zones for this site.
3. Section 11.2.4 – provide worst-case scenario pool fire models for the Crown Landing LNG site.
4. Section 11.2.5.1 – provide the Environmental Resource Report dated September 2004, (U.S. Dept of Energy study on safety of LNG shipping which was scheduled for release in November 2004).
5. Page 11-7 – provide an analysis of rapid phase transition for subsurface releases of LNG at the project site modeling maximum warm season river conditions and various tide stages.
6. Page 11-7 – provide the Hazards Identification Study (RRS, 2003).
7. Section 11.2.5.1 – provide the FERC ABS Study entitled "Consequence Assessment Methods of Incidents Involving Releases from LNG Carriers" (draft released 5/13/04).

8. **Page 11-10 - provide the US Coast Guard defined zone surrounding the LNG ships during transit to and loading at the facility. And address this with the respect to recreational boating and fishing at the subject reach of the Delaware River.**
9. **Page 11-11 - provide the USCG letter of recommendation (if available).**
10. **Page 11-13 - provide the Lloyds 2002 and the University of Houston 2003 studies.**
11. **Page 11-18 - discusses a proposed mooring study for stability during extreme winds. This work should be done in advance of the project. Please discuss or provide the study.**
12. **Page 11-19 - discuss why a ten-minute release was selected as adequate in terms of containing spilled LNG.**
13. **Page 11-19 - depict exclusion zones.**
14. **Page 11-20 - provide a delineation of the modeled vapor dispersion zones for the subject site.**

7:7E-7.12 Dredged material placement on land

(a) Dredged material placement is the disposal or beneficial use of sediments removed during dredging operations. Beneficial uses of dredged material include, but are not limited to, fill, topsoil, bricks and lightweight aggregate. This rule applies to the placement of dredged material landward of the spring high water line. The standards for dredged material disposal in Water Areas are found at N.J.A.C. 7:7E-4.8.

(b) Dredged material placement on land is conditionally acceptable provided that the use is protective of human health, groundwater quality, and manages ecological risks. Testing of the dredged material may be required as needed to determine the acceptability of the placement of the material on a particular site.

(c) Dredged material disposal is prohibited on wetlands unless the disposal satisfies the criteria found at N.J.A.C. 7:7E-3.27.

(d) The use of dredged material of appropriate quality and particle size for purposes such as restoring landscape, enhancing farming areas, capping and remediating landfills and brownfields, beach protection, creating marshes, capping contaminated dredged material disposal areas, and making new wildlife habitats is encouraged.

(e) Effects associated with the transfer of the dredged materials from the dredging site to the disposal site shall be minimized to the maximum extent feasible.

(f) Dredged material disposal in wet and dry borrow pits is conditionally acceptable (see N.J.A.C. 7:7E-3.14, and 3.35).

(g) If pre-dredging sediment analysis indicated contamination, then special precautions shall be imposed including but not necessarily limited to increasing retention time of water in the disposal site or rehandling basin through weir and dike design modifications, use of coagulants, ground water monitoring, or measures to prevent biological uptake by colonizing plants.

(h) All potential releases of water from confined (diked) disposal sites and rehandling basins shall meet existing State Surface Water Quality Standards (N.J.A.C. 7:9B) and State Groundwater Quality Standards (N.J.A.C. 7:9).

(i) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, New Jersey, 08625-0420, (609) 777-1038.

As discussed previously under the Rules on New Dredging, this application has been submitted

without the dredged material analysis as required by this Rule. Accordingly, a complete analytical report characterizing the subject sediment to be dredged must be submitted in order to address this Rule. This material must be submitted in accordance with the Department's guidance entitled: "The Management and Regulation of Dredging and Dredge Material Disposal in New Jersey's Tidal Waters, October 1997".

An evaluation of the data and a determination of whether dredging impacts comply with this Rule will be made after review of pending comments from the Department's Division of Fish and Wildlife; the National Marine Fisheries Service; the Federal Energy Regulatory Commission; U.S. Coast Guard and other commenting agencies. In addition, in order to address acceptability of the material for placement, a letter of acceptance from Weeks Marine or any other party accepting the material must be provided as required under the Rule on New Dredging 7:7E-4.7(10)(I).

SUBCHAPTER 8. RESOURCE RULES

7:7E-8.1 Purpose and scope

(a) In addition to satisfying the location and use rules, a proposed development must satisfy the requirements of this subchapter. This subchapter contains the standards the Department utilizes to analyze the proposed development in terms of its effects on various resources of the built and natural environment of the coastal zone, both at the proposed site as well as in its surrounding region.

7:7E-8.2 Marine Fish and Fisheries

(a) Marine fish are marine and estuarine animals other than marine mammals and birds. Marine fisheries means:

1. One or more stocks of marine fish which can be treated as a unit for the purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational and economic characteristics; and

2. The catching, taking or harvesting of marine fish.

(b) Any activity that would adversely impact on the natural functioning of marine fish, including the reproductive, spawning and migratory patterns or species abundance or diversity of marine fish, is discouraged. In addition, any activity that would adversely impact any New Jersey based marine fisheries or access thereto is discouraged, unless it complies with (c) below.

(c) The following coastal activities are conditionally acceptable provided that the activity complies with the appropriate general water area rule(s) at N.J.A.C. 7:7E-4:

1. Construction of submerged cables and pipelines;

2. Sand and gravel mining to obtain material for beach nourishment, provided:

i. The beach nourishment project is in the public interest;

ii. There are no alternative borrow sites that would result in less impact to marine fish and fisheries;

iii. Any alteration of existing bathymetry within Prime Fishing areas, as defined at N.J.A.C. 7:7E-3.4, does not reduce the high fishery productivity of these areas; and

iv. Measures are implemented to minimize and compensate for impacts to marine fish and fisheries; and

3. The establishment of Aquaculture Development Zones in accordance with N.J.A.C. 4:27-1 et seq. and any regulations developed and adopted pursuant thereto.

Impacts to the identified fish habitats will occur as a result of the pier structure; associated shading; the placement of pilings constituting fills in water areas; hydroacoustic impacts and ballast water withdrawn. Some of the associated physical disturbances and impacts are proposed to be miti-

gated by the creation of an intertidal and subtidal mitigation area. As state earlier, NJDEP Division of Fish and Wildlife indicated that ship ballast and tank hydrostatic test water withdrawals may adversely impact on the natural functioning of marine fish, including the reproductive, spawning and migratory patterns or species abundance. Accordingly, in order to enable the Department to determine compliance with these Rule additional detailed information bust be provided quantifying impacts to marine fish and fisheries that may occur as a result of the construction and operation of the Crown Landing LNG facility. This submission should contain all relevant alternatives for the avoidance and minimization of impacts and a report of agency input concerning avoidance and mitigative measures.

7:7E-8.7 Stormwater management

If a project or activity meets the definition of "major development" at N.J.A.C. 7:8-1.2, then the project or activity shall comply with the Stormwater Management rules at N.J.A.C. 7:8

The statement of compliance submitted with this application contains a stormwater management plan. The office is awaiting review comments on this information.

7:7E-8.8 Vegetation

(a) Vegetation is the plant life or total plant cover that is found on a specific area, whether indigenous or introduced by humans.

(b) Coastal development shall preserve, to the maximum extent practicable, existing vegetation within a development site. Coastal development shall plant new vegetation, particularly appropriate coastal species native to New Jersey to the maximum extent practicable.

This Rule requires preservation, to the maximum extent practicable, of existing vegetation and the planting of new native vegetation. A vegetation site plan should be submitted indicating the existing vegetation types and depicting native coastal species to be plated. This plan should show all areas to remain undisturbed as well as restoration areas.

7:7E-8.10 Air quality

(a) The protection of air resources refers to the protection from air contaminants that injure human health, welfare or property, and the attainment and maintenance of State and Federal air quality goals and the prevention of degradation of current levels of air quality.

(b) Coastal development shall conform to all applicable State and Federal regulations, standards and guidelines and be consistent with the strategies of New Jersey's State Implementation Plan (SIP). See N.J.A.C. 7:27 and New Jersey SIP for ozone, particulate matter, sulfur dioxide, nitrogen dioxide, carbon monoxide, lead, and visibility.

(c) Coastal development shall be located and designed to take full advantage of existing or planned mass transportation infrastructures and shall be managed to promote mass transportation services, in accordance with the Traffic rule, N.J.A.C. 7:7E-8.14.

(d) Rationale: See the note at the beginning of the Chapter.

This rule requires that coastal development projects be consistent with the strategies of New Jersey's State Implementation Plan (SIP), and this includes construction activities. The proposed construction activities are within nonattainment areas for 8-hour ozone and PM 2.5. Mitigation measures for emissions associated with the project construction need to be discussed with the Bureau of Air Quality Planning. In addition, there is a Precon-

struction Permit application (ID # 55971) pending with the Bureau of Preconstruction permitting which is under review. A final determination of compliance with this Rule will be based upon recommendations and or the issuance of an Air Permit.

7:7E-8.11 Public Access to the Waterfront

(a) Public access to the waterfront is the ability of all members of the community at large to pass physically and visually to from and along the ocean shore and other waterfronts.

(b) Coastal development adjacent to all coastal waters, including both natural and developed waterfront areas, shall provide permanent perpendicular and linear access to the waterfront to the maximum extent practicable, including both visual and physical access. Development that limits public access and the diversity of the waterfront experiences is discouraged.

1. All development adjacent to water shall, to the maximum extent practicable, provide, within its site boundary, a linear waterfront strip accessible to the public. If there is a linear waterfront accessway on either side of the site and the continuation of which is not feasible within the boundaries of the site, a pathway around the site connecting to the adjacent parts, or potential parts of the waterfront path system in adjacent parcels shall be provided.

3. Public access must be clearly marked, provide parking where appropriate, be designed to encourage the public to take advantage of the waterfront setting, and must be barrier free where practicable.

4. A fee for access, including parking where appropriate, to or use of publicly owned waterfront facilities shall be no greater than that which is required to operate and maintain the facility and must not discriminate between residents and non-residents except that municipalities may set a fee schedule that charges up to twice as much to nonresi-

dents for use of marinas and boat launching facilities for which local funds provided 50 percent or more of the costs.

5. All establishments, including marinas and beach clubs, which control access to tidal waters shall comply with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

6. Public access, including parking where appropriate, shall be provided to publicly funded shore protection structures, beaches nourished with public funds and to waterfronts created by public projects unless such access would create a safety hazard to the user. Physical barriers or local regulations which unreasonably interfere with access to, along or across a structure or beach are prohibited.

10. Development elsewhere in the coastal zone shall conform with any adopted municipal, county or regional waterfront access plan, provided the plan is consistent with the Coastal Zone Management rules.

11. The Department may require some or all of the public access portion of a site to be dedicated for public use through measures such as a conservation restriction.

12. Development adjacent to coastal waters shall provide fishing access within the provision of public access wherever feasible and warranted.

13. Development adjacent to coastal waters shall provide barrier free access within the provisions of public access wherever feasible and warranted by the characteristics of the access area.

14. For developments which reduce existing on-street parking that is used by the public for access to the waterfront, mitigation for the loss of these public parking areas is required at a minimum of 1:1 within the proposed development site or other location within 250 feet of the proposed project site.

(c) At sites proposed for the construction of single family or duplex residential dwellings, which are not part of a larger development, public access to the waterfront is not required as a condition of the coastal permit.

This Rule requires various forms of waterfront access to the public. The Department acknowledges the safety and security concerns relating to public access at the Crown Landing facility. Considering these issues onsite compliance with this Rule could be addressed either by providing a secured and limited area of ingress/egress to the waterfront onsite or acquiring or enhancing off-site waterfront access areas. Compliance with this Rule must be demonstrated through the submission a plan providing public access via one or more of the above recommendations.

7:7E-8.13 Buffers and Compatibility of Uses

(a) Buffers are natural or man-made areas, structures, or objects that serve to separate distinct uses or areas. Compatibility of uses is the ability for uses to exist together without aesthetic or functional conflicts.

(b) Development shall be compatible with adjacent land uses to the maximum extent practicable.

1. Development that is likely to adversely affect adjacent areas, particularly Special Areas N.J.A.C. 7:7E-3, or residential or recreation uses, is prohibited unless the impact is mitigated by an adequate buffer. The purpose, width and type of the required buffer shall vary depending upon the type and degree of impact and the type of adjacent area to be affected by the development, and shall be determined on a case-by-case basis.

2. The standards for wetland buffers are found at N.J.A.C. 7:7E-3.28.

3. The following apply to buffer treatment:

i. All buffer areas shall be planted with appropriate vegetative species, either through primary planting or supplemental planting. This landscaping shall include use of mixed, native vegetative species, with sufficient size and density to create a solid visual screen within five years from the date of planting.

ii. Buffer areas which are forested may require supplemental vegetative plantings to ensure that acceptable visual and physical separation is achieved.

iii. Buffer areas which are non-forested will require dense vegetative plantings with mixed evergreen and deciduous trees and shrubs. Evergreens must be at least eight feet tall at time of planting; deciduous trees must be at least three inches caliper, balled and burlapped; shrubs must be at least three to four feet in height.

Due to the special safety, and security issues and operations of LNG facilities the subject site may need substantial buffer areas surrounding it to assure safety and compatibility with surrounding land uses. According to the Energy Use Rule at N.J.A.C. 7:7E-7.5(S)(3)(iii), LNG facilities shall be located in areas that are not only remote and low-density but also have buffer zones likely to be maintained. Thermal exclusion zone and landscape plans should be provided to demonstrate compliance with this Rule.

7:7E-8.14 Traffic

(a) Traffic is the movement of vehicles, pedestrians or ships along a route.

(b) Coastal development shall be designed, located and operated in a manner to cause the least possible disturbance to traffic systems.

1. Alternative means of transportation, that is, public and private mass transportation facilities and services, shall be considered and, where feasible, incorporated into the design and management of a proposed development, to reduce the number of individual vehicle trips generated as a result of the facility. Examples of alternative means of transportation include: van pooling, staggered working hours and installation of ancillary public transportation facilitates such as bush shelters.

(c) When the level of service of traffic systems is disturbed by approved development, the necessary design modifications or funding contribution toward an area wide traffic improvement shall be prepared and implemented in conjunction with the coastal development, the satisfaction of the New Jersey Department of Transportation and any regional agencies.

(d) Any development that causes a location on a roadway to operate in excess of capacity Level D is discouraged. A developer shall undertake mitigation or other corrective measures as may be necessary so that the traffic levels at any affected intersection remain at capacity Level D or better. A developer may, by incorporating design modification or by contributing to the cost of traffic improvements, be able to address traffic problems resulting from the development, in which case development would be conditionally acceptable. Determinations of traffic levels which will be generated will be made by the New Jersey Department of Transportation.

(e) Coastal development located in municipalities which border the Atlantic Ocean, except as excluded under (e) 1, 2 or 3 below, shall provide sufficient on-site and/or offsite parking for its own use at a ration of two spaces per residential unit. In general, on street parking spaces along public roads cannot be credited as part of off-site parking provided for a project. All off-site parking facilities must be located either in areas within reasonable walking distance to the development or areas identified by any local regional transportation plans as suitable locations. All off-site parking facilities must also comply with N.J.A.C 7:7E-7.5(d), the parking facility rule, where applicable.

1. The non-oceanfront portions of the following municipalities which border the Atlantic Ocean are excluded from the parking requirement at (e) above:

i. Neptune Township, Monmouth County: Those portions of this municipality which are west of State Highway 71;

ii. Brick, Dover and Berkeley Townships, Ocean County: Those portions of these municipalities which are not located between Barnegat Bay and the Atlantic Ocean;

iii. Upper Township, Cape May County: Those portions of this municipality which are located between Whale Creek and the Atlantic Ocean and/or Strathmere Bay and the Atlantic Ocean; and

iv. Lower Township, Cape May County: Those portions of this municipality which are not between Lower Thorofare and the Atlantic Ocean and/or Jarvis Sound and the Atlantic Ocean;

2. The department shall reduce the parking requirement for developments restricted to senior citizen housing that is, restricted to persons at least 62 years of age or those persons meeting the definition of "senior citizen tenant" pursuant to the Senior Citizens and Disabled Protected Tenancy Act, N.J.S.A 2A:18-61, upon documentation that the paring needs of the development are less than two spaces per unit; or

3. Nursing homes and assisted living facilities are excluded from the parking requirement at (e) above.

The construction, and to the lesser extent, operation of the Crown Landing LNG facility may generate a significant volume of traffic including large equipment and material transport via roadways serving the site. In addition, in the event of a site emergency, significant traffic demands may arise at the site or surrounding roadways as a function of evacuations. Compliance with this Rule is limited to the comment provided in Table 7 of the compliance statement. It is indicated in the comment that the project will not cause local roadways to operate in excess of level of service "D". No traffic analysis was submitted in support of this assertion. Please submit a traffic analysis of the subject site with respect to demonstrating compliance with this Rule.

Based on the foregoing, the subject application is deficient and not complete for final review with respect to the Application Contents requirements and the Coastal Zone Management Rules. Accordingly, please address the indicated deficiencies and supply the needed narrative, plans and supporting information. Failure to supply the required information within ninety days of the date of this letter, pursuant to N.J.A.C 7:7-4.4(B)(4), may result in the Department Initiating cancellation of this application.

If you have any questions regarding this letter please contact me at (609) 292-9342.

Sincerely,

David Q. Risilia
Project Manager
Office of Dredging & Sediment Technology

C: William Jenkins, ACOE Philadelphia District Regulatory Branch

Anita Ripotella, National Marine Fisheries Service

Daniel Ryan, NJDEP Special Assistant to the Commissioner

Don Wilkenseon, NJDEP Fish and Wildlife

Steve Mars, US Fish and Wildlife Service

Robert Kopka, FERC

Lingard Knutson, USEPA, Region II

Laurie Beppler, BP Crown Landing

Draft Environmental Impact Statement

Crown Landing LNG and Logan Lateral Projects

Crown Landing, L.L.C.
Texas Eastern Transmission, L.P.
Docket Nos. CP04-411-000 and CP04-416-000
FERC/EIS – 0179D



Federal Energy Regulatory Commission
Office of Energy Projects
Washington, DC 20426

Cooperating Agencies

US Army Corps of Engineers

February 2005

TABLE 3.3.3-1

Environmental Comparison of the LNG Terminal Site Alternatives to the Crown Landing LNG Terminal Site

	Proposed Site	Church Landing Site	Carneys Point Site	Ferro Site	Shuran Site	Repaupo Site	Paulsboro Site	Mantua Creek Site
	Delaware River Mile 78 Logan Township, NJ	Delaware River Mile 68 Pennsville Township, NJ	Delaware River Mile 69 Pennsville and Carneys Point Township, NJ	Delaware River Mile 79 Logan Township, NJ	Delaware River Mile 80 Logan Township, NJ	Delaware River Mile 86 Greenwich Township, NJ	Delaware River Mile 88 Paulsboro Borough, NJ	Delaware River Mile 90 West Deptford, NJ
Required Criteria a/								
Site Encompasses the Thermal Exclusion/Vapor Dispersion Zone	Yes	Yes	No	No	No	No	No	Yes
Site Meets Airport Setback Requirements b/	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Site Satisfies Waterfront Handling Requirements	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Favorable Criteria								
Estimated Population Within 1 mile/2 mile Radius	82/383	1,577/5,362	482/4,407	60/178	57/589	1,943/3,783	3,578/10,354	389/8,091
Site Size (acres)	175	170	30	80	210	86	90	277
Dredging Requirement (cubic yards)	0.8 million	0.6 million	0.2 million	1.5 million	2.0 million	0.75 million	0.1 million	1.5 million
Parcel Availability c/	High	Medium (not available until 2007)	Low	Low	Medium	Medium	Medium	Unknown
Existing Site Activities	Limited Agricultural Use	Connectiv's Deepwater Generating Station	DuPont Plant	Chemical Factory	DuPont Plant	Adjacent to DuPont Plant	BP/Mobil Corporate Industrial Park	PG&E Facility
Existing Land Use	Agricultural	Industrial	Industrial	Industrial	Forested Wetland/Open	Forested/Wetland	Industrial	Open
Existing Zoning	Industrial	Industrial	Industrial	Industrial	Industrial	Industrial	Industrial	Industrial

TABLE 3.3.3-1 (cont'd)

Environmental Comparison of the LNG Terminal Site Alternatives to the Crown Landing LNG Terminal Site

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Approximate Total Sendout Pipeline Length (miles) g/	11	22	20	9	8	10	12	14
Road Access	U.S. Route 130	State Route 49	U.S. Route 130	U.S. Route 130	U.S. Route 130	Township Road	Borough Road	Township Road
Ship Channel Width and Maneuvering Area	adequate	adequate	adequate	adequate	adequate	adequate	adequate	adequate
Ship Channel Transit Distance (nautical miles) g/	61.5	52.5	53.5	63.0	64.0	68.5	70.5	71.5
Berth Orientation	perpendicular	perpendicular	perpendicular	perpendicular	perpendicular	parallel	parallel	parallel
Distance of Shore from Ship Channel (feet)	4,000	2,500	1,700	4,200	4,500	900	200	2,800
Potential Shipping Conflicts	none	yes	yes	none	none	yes	Yes	yes
Potential Bridge Conflicts	none	yes	yes	none	none	none	None	none
Per Capita Income	$22,708	$22,717	$22,717	$22,708	$22,708	$24,791	$16,368	$24,219
Percent Minority	13	3.5	3.5	13	13	5.5	36.4	7.7
Percent of Population Below Poverty Level (all ages) i/	6.2	4.9	4.9	6.2	6.2	3.6	17.7	5.3
Conflict with DE CZA and CZMP	Yes	Yes	Yes	No	No	No	No	No
Special Interest Areas	None	None	None	None	None	None	None	None
Non-tidal Wetland Impacts (acres)	<1.0	<1.0	<1.0	>10.0	>1.0	>1.0	<1/0	<1.0

TABLE 3.3.3-1 (cont'd)

Environmental Comparison of the LNG Terminal Site Alternatives to the Crown Landing LNG Terminal Site

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Other Miscellaneous Environmental Factors	--	Site is adjacent to recreation areas and historical site.	--	Site is within bald eagle nest buffer. Site development would require large amount of wetland impacts.	Site is within bald eagle nest buffer.	Site development would require large amount of wetland impacts.	Site is within bald eagle nest buffer.	Site is within bald eagle nest buffer.

a/ — Required criteria include regulatory specifications regarding LNG facility layout and safety siting.

b/ See text below for potential site conflicts in reference to the 2020 Philadelphia International Airport (PHL) Master Plan.

c/ High availability - the site is available for industrial use and a negotiated settlement to use the property has been reached with the current landowner.
Medium availability - the site is available for industrial use but no negotiations have taken place with the current landowner.
Low availability - the site is not available based on discussions between Crown Landing with the current landowner.

d/ Distance listed includes minimum distance needed to tie into existing pipeline

e/ Transit distance = start of navigation channel to terminal site

f/ Based on 2000 U.S. Census Bureau poverty thresholds.

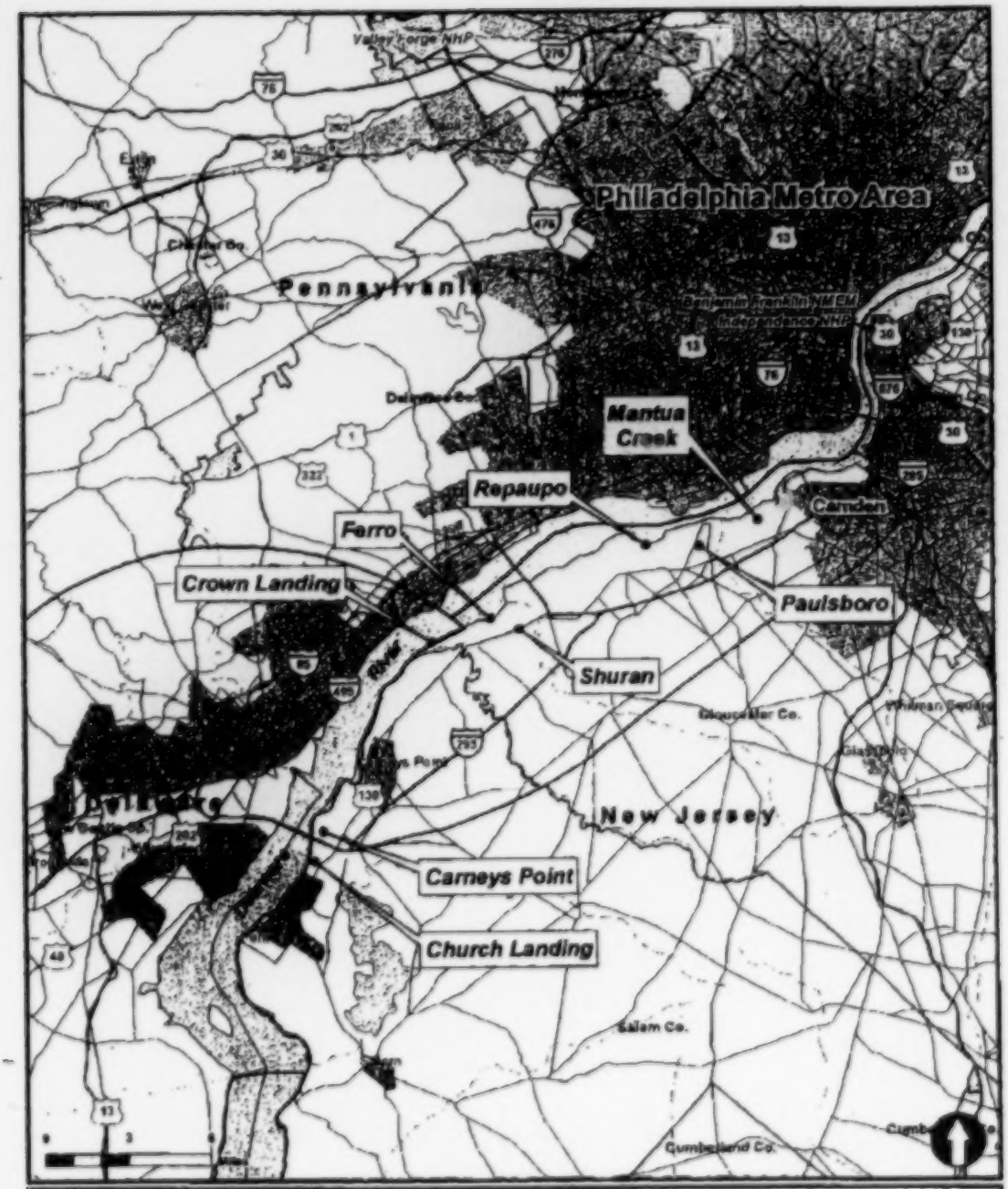


Figure 3.3.3-1
Crown Landing LNG Project
Proposed and Alternative LNG Terminal Sites Along the Delaware River

APPENDIX 10

COMPILED STATUTES
OF
NEW JERSEY

PUBLISHED UNDER THE
AUTHORITY OF THE LEGISLATURE BY VIRTUE OF
AN ACT APPROVED APRIL 12, 1910

* * * * *

VOLUME IV

* * * * *

RIPARIAN RIGHTS

Sec.

1. Board of commissioners; appointment; powers and duties.
2. Further grants, etc., not to be made until report of commissioners.
3. Commissioners; oath of office.
4. Commissioners; vacancies.
5. Surveyors, agents, etc.; appointment; entry on lands.
6. [Repealed.]
7. Notice of meetings.
8. Exterior bulkhead and pier lines established.
9. Filling in beyond bulkhead line; erection of piers.
10. Reclamation of lands under tide-waters; consent of commissioners; previous grants; repeal.
11. Conveyance or lease with covenant affecting lands under water.

12. Payment of or security for purchase-money or rent for lands under water.

13. Commissioners; appointment.

14. Commissioners; powers.

15. Grant of lands under water.

16. Commissioners; compensation.

17. Proceeds of sales and rentals; application.

18. Commissioners; oath.

19. Trespasses on lands of state under water; proceedings against trespassers; expenses.

20. Grant to person other than riparian owner; rights of riparian owner; how extinguished; appeal.

21. Riparian owners; application to commissioners for lease or conveyance.

22. Waters excluded from application of act.

23. Commissioners may change pier lines or lines for solid filling; filing map and survey.

24. Encroachment prohibited.

25. Commissioners may make lease or sale; public basins.

26. Commissioners may fix purchase-money or rentals for lands below tide-water; conveyances.

27. Compensation by canal company for lands under water taken from parties to whom the state has leased or granted them.

28. Extension of surveys over tide-waters; expenses.

29. Location of roads on land of riparian owner along shore not to affect riparian rights.

30. Grant or lease of lands whereon are natural oyster beds, restricted.

31. Grants to municipalities of lands under water in front of public square or park; conditions.

32. Use of riparian rights facing public park for business purposes.

33. Use not to forfeit grant.

34. Riparian commissioners to establish exterior bulkhead and pier lines around Islands in tidal-waters.

35. Sale or lease of lands under water embraced within established lines.

36. Removal of deposits of sand, etc., from lands under tidal-waters without license; penalty.

37. License to dig, etc., deposits of sand under tidal-waters; moneys to be paid to state treasurer.

38. Lease or grant of lands under water to persons other than riparian owners; notice.

39. Sale or lease of lands below mean high-water mark.

40. Lands under water adjacent to or in front of Palisades; leases; terms and conditions.

41. Grants to municipalities of lands under tide water in front of public park or street; conditions.

42. Consideration of grants to municipalities; reversion.

43. Conveyances to others than municipalities prohibited.

44. List of riparian leases in arrears to be prepared; reentry; notice; report of commissioners; new lease or grant.

45. Responsibility of stat treasurer as to leases; release.

46. Laying pipes under tidal waters; consent of governor and commissioners required.

47. Payments in discharge of leases; conveyance in fee simple.

48. Leases to which resolution applies.

49. Covenants, clauses and conditions to be inserted in grants or leases of lands under water.

50. Salary of commissioners.

51. Board of riparian commissioners; members; appointment; term

52. Board to be non-partisan; vacancies.

53. Terms of members of existing board ended.

54. Commissioners; compensation.

55. Repealer.

56. Commissioners not to grant exclusive right to plant or take oysters in Delaware bay.

57. Claims of persons holding deeds from state for lands under water, conveyance of which has failed; appointment of commissioners; report; payment; reconveyance of rights to state.

58. Determination of title to riparian lands or lands under water; suit in chancery; requisites of bill, etc.

59. Statement of object of suit to be given with subpoena.

60. Costs.

61. Answer of defendant; claim to be specified.

62. Issue at law to settle validity of claim.

63. Final decree to settle rights of parties; terms of decree.

An Act to ascertain the rights of the state and of the riparian owners in the lands lying under the waters of the bay of New York, and elsewhere in the state.

(P. L. 1864, p. 681. P. L. 1869, p. 1017. P.L. 1871, p. 44. P. L. 1872, p. 99. P. L. 1874, pp. 103, 136. P. L. 1875, p. 53. P. L. 1877, p. 113. Rev. 1877, p. 980.)

Preamble.—Whereas, it is represented to the legislature of the state that grants of rights to occupy land under the waters of the bay of New York and the Hudson river, and elsewhere within the state have been made and are liable to be made, without sufficient information of the rights of the state and of the riparian owners in the same, therefore, with the view of obtaining the proper information to enable the legislature to protect the rights of the state,

1. **Board of commissioners; appointment; powers and duties.**—That a board of commissioners be nominated by the governor and confirmed by the senate, to consist of six citizens of this state, who shall have power and whose duty it shall be to cause the necessary surveys and examinations to be made by competent surveyors of the lands lying under the waters of the bay of New York and of the Hudson river, and of the lands adjacent thereto, the Kill von Kull, Newark bay, Arthur's kill, the Raritan bay, and the lands lying under the water of the Delaware river, opposite to the county of Philadelphia, the right to reclaim which has not been granted by the state, and to obtain all needful information from other sources, in order to ascertain the present rights of the state in the same, and the value of said rights; and to fix and establish an exterior line in the said bays and rivers, beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind shall be permitted to be made, and to report to the next legislature, on or before the first day of February next, the result of the information thus obtained, and the value of the said rights, together with the evidence upon which the same is founded; and second, that they shall recommend to the legislature such plans and provisions for the improvement, use, renting or leasing of the said lands under water as they shall deem necessary for and most conducive to the interest of the state, and to have prepared, and submit with their report, maps of said land exhibiting the exterior line fixed and established by them in said bays and rivers, and the

lines of the existing piers, wharves and bulkheads, and also showing any grants of lands under the waters of said bays and rivers which have not been occupied and also the original shore line as far as the same can be ascertained, accompanied with such field notes, measurements and elucidations as they shall deem necessary to a full exposition and understanding on the subject. (Rev. 1877, p. 981.)

2. **Further grants, etc., not to be made until report of commissioners.**--That until such report is made no further grant, lease or sale of any of said lands shall be made, and the said commissioners may apply to the chancellor for an order to restrain and stay all proceedings, erections and obstructions until the further direction of the legislature; and if any permanent erection in or obstruction of the said waters, within the said exterior line to be fixed or established by them, be commenced or continued after such order, the said chancellor may cause the said order to be enforced, and disobedience thereof to be punished by the court of chancery, in the same manner and to the same extent as in cases of injunction issued out of said court; and any permanent erection or obstruction, made contrary to any such written order, may be removed and abated by the order of the chancellor; provided, however, that the said commissioners or the chancellor shall not interfere with any rights already granted, or which have been or may be granted at the present session of the legislature. (Rev. 1877, p. 981.)

3. **Commissioners; oath of office.**--That the said commissioners shall take and file in the office of the secretary of state an oath well, truly and faithfully to perform the duties of their appointment, before entering upon said duties, and they shall not be or become interested, directly or indirectly, in any water rights or rights to occupy lands under water in the said bays or rivers, nor in any real estate that can in any way be benefited or affected by the establishment of such exterior lines, or by any measures that they may recommend; and upon proof being made to the governor of any one of said commissioners

being so interested, and upon a hearing of a party so charged, he may be removed from office by the governor. (Rev. 1877, p. 981.)

4. **Commissioners; vacancies.**—That any vacancies in the board of commissioners, caused by removal, resignation, refusal to serve or otherwise, shall be filled by appointment by the governor, of a citizen of this state not interested as aforesaid. (Rev. 1877, p. 981.)

5. **Surveyors, agents, etc.; appointment; entry on lands.**—That the said commissioners may appoint surveyors, agents and others necessary for the discharge of these duties, and they and their agents may enter upon any land for the purpose of surveying or obtaining any information on the subject of their appointment. (Rev. 1877, p. 981.)

6. [Repealed.]

7. **Notice of meetings.**—That the said commissioners shall give public notice of the time and place of their first meeting by advertisement published for ten days in each of the papers printed in the counties in which the commissioners shall make their investigation, and all subsequent meetings of the commissioners shall be publicly adjourned to some particular time and place. (Rev. 1877, p. 982.)

8. **Exterior bulkhead and pier lines established.**—Sec. 1. That the bulkhead line or lines of solid filling and the pier lines in the tide-waters of the Hudson river, New York bay and Kill von Kull, lying between Enyard's dock, on the Kill von Kull and the New York state line, so far as they have been recommended and reported to the legislature by the commissioners appointed under the original act, of which this is a supplement, by report bearing date February first, eighteen hundred and sixty-five, are hereby adopted and declared to be fixed and established, as the exterior bulkhead and pier lines between the points above named, as such exterior bulkhead and

pier lines, so fixed, established and adopted, are shown upon the manuscript maps, accompanying said report, and filed in the office of the secretary of state, except said lines drawn on said maps over or upon lands within the boundaries of the grant made to the Morris canal and banking company, by act approved March fourteenth, eighteen hundred and sixty-seven. (Rev. 1877, p. 982)

9. **Filling in beyond bulkhead lines; erection of piers.**—*Sec. 2.* That it shall not be lawful to fill in with earth, stones or other solid material, in the tide-waters of the Hudson river, New York bay and Kill von Kull, beyond the bulkhead line or lines of solid filling by this act adopted, fixed and established, laid down and exhibited on the aforesaid maps; and that it shall not be lawful to erect or maintain any pier or other structure exterior to the said bulkhead line or lines of solid filling in any place or places where no exterior line for piers is reported or indicated by said maps, on the Hudson river, New York bay and Kill von Kull; and that when an exterior line for piers is recommended and shown by said report and maps, no erection or structure of any kind shall hereafter be erected, allowed or maintained beyond or exterior to the aforesaid bulkhead line or lines of solid filling, except piers which shall not exceed one hundred feet in width respectively, and which shall in no case extend beyond the line indicated for piers on said maps accompanying said report; and no piers shall hereafter be constructed in said tide-waters, when such exterior pier lines are adopted, fixed and established, at less intervals between such piers than seventy-five feet, except at places occupied and used for ferries, or to be so occupied or used, when the spaces between the piers may be less; nor shall any such pier be constructed in any other manner than on piles or on blocks and bridges; and if on blocks and bridges, such blocks and bridges shall not occupy more than one-half of the length of the pier, and they shall be so constructed as to permit a free flow or passage of water under and through them, without any other interruption or obstruc-

tion than the pile or blocks necessary to support said piers. (Rev. 1877, p. 982.)

10. Reclamation of lands under tide-waters; consent of commissioners; previous grants; repeal.—Sec. 3. That the act entitled "An act to authorize the owners of lands upon tide-waters to build wharves in front of the same," approved March eighteenth, one thousand eight hundred and fifty-one, be and the same is hereby repealed as to the tide-waters of this state below the line of mean high tide; but said repeal shall not be construed to restore any supposed rights, usage or local common law, founded upon the tacit consent of the state or otherwise to fill in any land under water below mean high tide; and without the grant or permission of said commissioners no person or corporation shall fill in, build upon or make any erection on or reclaim any of the lands under the tide-waters of this state; and in case any person or corporation so offending shall be guilty of purpresture, which shall be abated at the cost and expense of such person or corporation, on application of the attorney-general, under decree of the court of chancery or by indictment in the county in which the same may be, or opposite to or adjoining which said purpresture may be; provided, however, that neither this section nor any provision in this act contained shall in any wise repeal or impair any grant of land under water, or right to reclaim made directly by legislative act, or grant or license, power or authority, so made or given, to purchase, fill up, occupy, possess and enjoy lands covered with water fronting and adjoining lands owned or authorized to be owned by the corporation, or grantee or licensee in the legislative act mentioned, its, his or their representatives, grantee or assigns, or to repeal or impair any grant or license, power or authority to erect or build docks, wharves and piers opposite and adjoining lands owned, or authorized to be owned by the corporation, or grantee or licensee in the legislative act mentioned, its, his or their representatives, grantees or assigns heretofore made, or which may be made or

granted at the time this act goes into effect, or given directly by legislative acts, whether said acts are or are not repealable, and as to any revocable license given by the board of chosen freeholders of a county before this act goes into effect to build docks, wharves or piers, or to fill in or reclaim any lands under water in this state, the same shall be irrevocable so far as the land under water has been or shall be lawfully reclaimed or built upon under any such license issued prior to July first, eighteen hundred and ninety-one, provided such reclamation or building under such license shall be completed prior to January first, eighteen hundred and ninety-two; but as to the future such revocable license, if the said lands covered by the license have not been wholly or in part lawfully reclaimed or built upon, is hereby revoked, and no occupation or reclamation of land under water without such legislative act or revocable license shall divest the title of the state, or confer any rights upon the party who has reclaimed or who is in possession of the same. (Rev. 1877, p. 982, as amended P. L. 1891, p. 216.)

[Inconsistent laws repealed.]

11. Conveyance or lease with covenant affecting lands under water.—Sec. 4. That in case any person or corporation who by any legislative act, is a grantee or licensee, or has such power or authority, or any of his, her or their representatives or assigns shall desire a paper capable of being acknowledged and recorded, made by and in the name of the state of New Jersey, conveying the land in the proviso to the third section mentioned whether under water now or not, and the benefit of an express covenant, that the state will not make or give any grant or license power, or authority affecting lands under water in front of said lands, then and in either of such cases, such person or corporation, grantee or licensee, having such grant and license, power or authority, his, her or their representatives or assigns on producing a duly-certified copy of such legislative act to said commissioners, and m case of a representative or assignee also satisfactory evi-

dence of his, her or their being such representative or assignee, and requesting such grant and benefits as in this section mentioned, shall be entitled to said paper so capable of being acknowledged and recorded, and granting the title and benefits aforesaid, on payment of the consideration hereinafter mentioned; and the said commissioners or any two of them, with the governor and attorney-general for the time being, to be shown by the governor signing the grant, and the attorney-general attesting it, shall and may execute and deliver and acknowledge in the name and on behalf of the state, a lease in perpetuity to such grantee or licensee or corporation having such grant, license, power or authority, and to the heirs and assigns of such grantee or licensee, or to the successors and assigns of such corporation, upon his, her or their securing to be paid to the state an annual rental of three dollars for each and every lineal foot measuring on the bulkhead line, or a conveyance to such grantee or licensee or corporation having such grant, license, power or authority, and to the heirs and assigns of such grantee or licensee, or to the successors and assigns of such corporation in fee, upon his, her or their paying to the state fifty dollars for each and every lineal foot measuring on the bulkhead line, in front of the land included in said conveyance; provided, that no corporation to whom any such grant, license, power or authority was given by legislative act as aforesaid, in which provision was made for the payment of money to the treasurer of the state for each and every foot of the shore embraced and contained in the act; nor the assigns of such corporation shall be entitled to the benefits of this section; and provided further, that the said commissioners shall in no case grant lands under water beyond the exterior lines hereby established, or that may be hereafter established, but the said conveyance shall be construed to extend to any bulkhead or pier line further out on said river and bay that may hereafter be established by legislative authority; in case any person or corporation taking a lease under this section, shall desire af-

terwards a conveyance of all or any part of the land so leased, the same shall be made upon payment of the said sum of fifty dollars for every such lineal foot, as aforesaid, of the land so desired to be conveyed, the conveyance or lease of the commissioners under this or any other section of this act, shall not merely pass the title to the land therein described, but the right of the grantee or licensee, individual or corporation, his, her or their heirs and assigns, to exclude to the exterior bulkhead line, the tide-water by filling in or otherwise improving the same, and to appropriate the land to exclusive private uses, and so far as the upland from time to time made shall adjoin the navigable water, the said conveyance or lease shall vest in the grantee or licensee, individual or corporation, and their heirs and assigns, the rights to the perquisites of wharfage, and other like profits, tolls and charges. (Rev. 1877, p. 983.)

12. Payment of or security for purchase-money or rent for lands under water.— Sec. 5. That no grant hereafter made, extending beyond the line of high-water mark, shall be in force or operation as to so much thereof as extends below said line of high-water mark, until the grantee or grantees shall have paid into the treasury of the state such compensation or rentals, or secured to the state such payment or rentals for the estate in the lands lying below the said line of mean high-water mark, contained in and conveyed by such grant or lease as is hereinafter provided. (Rev. 1877, p. 984.)

13. Commissioners; appointment.—Sec. 6. That four commissioners shall be appointed by the governor, by and with the advice and consent of the senate, who are hereby required and empowered to complete as much of the details of the work assigned to them by such original act, by surveys and otherwise, on the Hudson river, New York bay, and Kill von Kull, as in their judgment the interest of the state requires. (Rev. 1877, p. 984.)

14. Commissioners; powers.—Sec. 7. That all the powers and duties of the said commissioners, contained in the act to which this is a supplement, be and the same are hereby continued in force, except so far as the same are superseded or modified by any of the provisions of this act. (Rev. 1877, p. 984.)

15. Grant of lands under water.—Sec. 8. That if any person or persons, corporation or corporations, or associations, shall desire to obtain a grant for lands under water which have not been improved, and are not authorized to be improved, under any grant or license protected by the provisions of this act, it shall be lawful for any two of the said commissioners concurring, together with the governor and attorney-general of the state, upon application to them, to designate what lands under water for which a grant is desired lie within the exterior lines, and to fix such price, reasonable compensation, or annual rentals for so much of said lands as lie below high-water mark, as are to be included in the grant or lease for which such application shall be made, and to certify the boundaries, and the price, compensation or annual rentals to be paid for the same, under their hands, which shall be filed in the office of the secretary of state; and upon the payment of such price or compensation or annual rentals, or securing the same to be paid to the treasurer of this state, by such applicant, it shall be lawful for such applicant to apply to the commissioners for a conveyance, assuring to the grantee, his or her heirs and assigns, if to an individual, or to its successors and assigns, if to a corporation, the land under water so described in said certificate; and the said commissioners shall, in the name of the state, and under the great seal of the state, grant the said lands in manner last aforesaid, and said conveyance shall be subscribed by the governor and attested by the attorney-general and secretary of state, and shall be prepared under the direction of the attorney-general, to whom the grantee shall pay the expense of such preparation, and upon the delivery of such conveyance, the grantee may

reclaim, improve, and appropriate to his and their own use, the lands contained and described in the said certificate; subject, however, to the regulations and provisions of the first and second sections of this act, and such lands shall thereupon vest in said applicant; provided, that no grant or license shall be granted to any other than a riparian, proprietor, until six calendar months after the riparian proprietors shall have been personally notified in writing by the applicant for such grant or license, and shall have neglected to apply for the grant or license, and neglected to pay, or secured to be paid, the price that said commission shall have fixed; the notice in the case of a minor shall be given to the guardian, and in case of a corporation to any officer doing the duties incumbent upon president, secretary, treasurer or director, and in case of a nonresident, the notice may be by publication for four weeks successively in a daily newspaper published in Hudson county, and in a daily newspaper published in New York city. (Rev. 1877, p. 984.)

16. **Commissioners; compensation.**—Sec. 9. That the same compensation for the time and personal expenses of said commissioners shall be allowed and paid as heretofore, and all other expenditures to be incurred by the said commissioners in the prosecution and completion of their works contemplated by the original act and this supplement, shall not exceed the sum of five thousand dollars annually, which sum is hereby appropriated out of any money in the treasury not otherwise appropriated, to be subject to the draft of said commissioners, and shall be paid upon the warrant of the comptroller, upon satisfactory vouchers being produced of such expenditures made or incurred. (Rev. 1877, p. 985.)

17. **Proceeds of sales and rentals; application.**—Sec. 10. That the moneys so received from the sales and rentals of the said lands under water shall be first appropriated to the payment of such appropriation as the legislature may authorize from time to time, then to the payment and liquidation of the state debt, and afterwards the

same shall be invested according to law, and the interest thereof be annually paid over to the trustees of the school fund, to be appropriated by them towards the maintenance of free schools. (Rev. 1877, p. 985.)

18. Commissioners; oath.—Sec. 11. That the said commissioners shall take and file in the office of the secretary of state, an oath, well, truly and faithfully to perform the duties of their appointment before entering upon their said duties. (Rev. 1877, p. 985.)

19. Trespasses on lands of state under water; proceedings against trespassers; expenses.—Sec. 12. That the said commissioners may commence proceedings in the name of the state of New Jersey, by ejectment or otherwise, against persons and corporations trespassing upon or occupying the lands of the state under water, or which were heretofore under water, and the attorney-general of the state is hereby required to commence and prosecute such actions as may be instituted or directed by the said commissioners; and his expenses and disbursements, and the expenses and disbursements of such assistants as may be appointed by the governor, and their reasonable charges and counsel fees shall be taxed by the chief justice and paid by the treasurer, on presentation of the bill so taxed. (Rev. 1877, p. 985.)

20. Grant to person other than riparian owner; rights of riparian owner; how extinguished; appeal.—Sec. 13. That in any case where a grant of the lands of the state under water is made by the commissioners, to any person other than the riparian owner that the state's grantee shall not fill up or improve said lands under water until the rights and interest of the riparian owner in said lands under water (if any he has) shall be extinguished, as follows: the said commissioners shall fix the amount to be paid to said riparian owner for his rights and interest therein (if any he has), and said riparian owner shall have the right, within twenty days after he has been notified of said amount, to accept said sum in

full extinguishment of all his rights, or if he is dissatisfied with said award he may apply to the supreme court at the next term thereafter for a struck jury to try the question in such place as may be designated by said court, and said jury may increase or diminish the amount to be paid the said riparian owner, and their verdict shall be final as to said amount, and on the payment or tender by the state's grantee to the riparian owner of the amount fixed by said jury all the rights and interests of said riparian owner in the lands of the state under water in front of his land shall be extinguished; that the costs of the trial shall be paid as follows: if the verdict of the jury is greater than the award of the commissioners then the state shall pay the costs of the trial, if the verdict is the same as the award or less than the award of the commissioners then the riparian owner shall pay the costs. (Rev. 1877, p. 985.)

21. Riparian owners; application to commissioners for lease or conveyance.—Sec. 1. That any riparian owner on tide-waters in this state who is desirous to obtain a lease, grant or conveyance from the state of New Jersey of any lands under water in front of his lands, may apply to the commissioners appointed under the act to which this is a supplement and the supplements thereto, who may make such lease, grant or conveyance with due regard to the interests of navigation, upon such compensation therefor, to be paid to the state of New Jersey, as shall be determined by said commissioners, which lease, conveyance or grant shall be executed as directed in the act to which this is a supplement and the supplements thereto, and shall vest all the rights of the state in said lands in said lessee or grantee. (Rev. 1877, p. 985.)

22. Waters excluded from application of act.—Sec. 2. That this act shall not interfere with the original act or its supplements as to the waters of the Hudson river, New York bay or Kill von Kull, easterly of Enyard's dock. (Rev. 1877, p. 985.)

Preamble. —Whereas, the riparian commissioners recommend some changes in the line for solid filling in the bay of New York and Hudson river, and to enable them to make the changes proposed, and to Provide additional wet basins in the same;

23. Commissioners may change pier lines or lines for solid filling; filing map and survey.—Sec. 1. That the riparian commissioners may change, fix and establish any other lines than those now fixed and established for pier lines, or lines for solid filling in the waters of the bay of New York or the Hudson river, or make any changes in any basin now fixed and established, or lay out and fix and establish any new basin or basins in the waters of the bay of New York or the Hudson river, and when so fixed and established, the said riparian commissioners shall file a map and surveys in the office of the secretary of state, showing what lines have been fixed and established by them for the exterior lines for solid filling and pier lines, as well as for any changes in basins or new basins fixed, laid out and established by them under this act. (Rev. 1877, p. 986.)

24. Encroachment prohibited.—Sec. 2. That from and after the filing of said map and surveys in the office of the secretary of state, no encroachment of any kind shall be permitted to be made beyond said lines so fixed and established for solid filling or pier lines, or in or upon any basin or basins so laid out and established. (Rev. 1877, p. 986.)

25. Commissioners may make lease or sale; public basins.—Sec. 3. That the said riparian commissioners may make, for a satisfactory consideration, any lease or sale to the owners of the lands fronting on the said basin, of the right to have the exclusive use of the said basin or basins, for the purpose of wharfage and docking, and to charge a reasonable sum for the use of the same on the line of bulkhead owned by them respectively; and that from and after the filing of said map and survey, the same

shall remain as a public basin or basins, and they are hereby dedicated for that purpose. (Rev. 1877, p. 986.)

26. **Commissioners may fix purchase-money or rentals for lands below tide-water; conveyances.**—Sec. 1. That from and after the passage of this act it shall be lawful for the riparian commissioners, or any three of them therein concurring, together with the governor of this state, to fix and determine, within the limits prescribed by law, the price or purchase-money, or annual rental to be paid by any applicant for so much of lands below high-water mark, or lands formerly under tide-water belonging to this state as may be described in any application therefor duly made according to law; and the said commissioners, or any three of them therein acting and concurring, with the approval of the governor, shall in the name and under the great seal of the state, grant or lease said lands to such applicant accordingly; and all such conveyances or leases shall be prepared by the said commissioners or their agents at the cost and expense of the grantee or lessee therein, and shall be subscribed by the governor, and at least three of said commissioners, and attested by the secretary of state. (Rev. 1877, p 986.)

[Inconsistent laws repealed.]

27. **Compensation by canal company for lands under water taken from parties to whom the state has leased or granted them.**—Sec. 1. That in all cases where lands which now are or ever have been under the tide-waters of this state, but which have been or may hereafter be leased or granted by this state to any person or persons, party or parties, shall be taken by the company incorporated by an act entitled "An act to incorporate a company to form an artificial navigation between the waters of Newark bay and New York bay," approved March thirteenth, one thousand eight hundred and sixty-six, or by virtue of any supplement thereto, or by any commissioners appointed under last-mentioned act; that in such case such person or persons, party or parties, and

all persons claiming through and under them, or either of them, shall be entitled to compensation for the lands or any materials so taken, in the same way and manner as the owner or owners of lands and materials taken for said company, under and by virtue of last-mentioned act, or the supplements thereto, are entitled to compensation therefor; and in case of dissatisfaction with the report made by the commissioners appointed under last-mentioned act, and the supplements thereto, they or either of them shall have the same right to appeal, and under the same provisos as is provided for by the said last-mentioned act, and the supplement thereto; provided, however, that nothing in this act or in the said act approved March thirteenth, one thousand eight hundred and sixty-six, or any supplement thereto shall be construed to give any right, title or interest of the state to lands under water to any person or persons, corporation or corporations. (Rev. 1877, p. 987.)

[Inconsistent laws repealed.]

Preamble.—Whereas, applications are frequently made to the riparian commissioners for grants of lands under tide-water in various parts of the state, requiring surveys to be made and maps to be prepared and filed with the secretary of state, and some provision should be made to have these surveys extended from time to time as the citizens of the state may require, and in order to provide the necessary means for carrying on this work without any additional tax on the treasury of the state; therefore,

28. Extension of surveys over tide-waters; expenses.— Sec. 1. That the riparian commissioners may and shall, at the request of shore-owners, extend their surveys over the tide-waters of this state and prepare maps and have the same filed as now provided by the act to which this is a supplement and the supplements thereto; and to provide the necessary means to pay the expenses incurred by them in this work they may retain

and expend for this purpose from the riparian fund, before any portion thereof is transferred to the school fund for permanent investment, a sum not exceeding in the aggregate five per centum of the amount named in the grants made to riparian owners, and they may further retain and disburse from the said fund the necessary sum to pay the salaries of the commissioners and the expenses incurred in the prosecution of their work as now provided by law, rendering in their annual report a detailed statement of the amounts so retained and disbursed; provided, that when in any year the grants made by the commissioners shall not amount (after deducting the above specified five per cent.) sufficient sum to pay the said salaries and expenses, such salaries and expenses shall be paid from the state treasury, and be returned thereto by the said commissioners from the proceeds of the first subsequent grants thereafter made. (Rev. 1877, p. 987, as amended P. L. 1888, p. 437.)

29. Location of roads on land of riparian owner along shore not to affect riparian rights.—Sec. 1. That when land has been or shall be taken or granted for a right of way, and such right of way has been or shall be so located on land of a riparian owner as to occupy the same along or on the shore line, and thereby separate the upland of such riparian owner adjoining that used for such right of way from tide-water, such owner of the land so subject to such right of way shall be held to be the riparian owner for the purpose of receiving any grant or lease heretofore or hereafter made of lands of the state under water, or for the purpose of receiving any notice under the act to which this is a supplement or the supplements thereto: provided, that nothing in this act shall affect the rights of the state to the lands lying under water. (Rev. 1877, p. 987.)

30. Grant or lease of lands whereon are natural oyster beds, restricted.—Sec. 1. That no grant or lease of lands under tide-water, whereon there are natural oyster beds, shall hereafter be made by the riparian commis-

sioners of this state, except for the purpose of building wharves, bulkheads or piers. (P. L. 1888, p. 140.)

31. Grants to municipalities of lands under water in front of public square or park; conditions.—Sec. 1. That whenever any public square or park now dedicated in any city or other municipality shall front upon any tide-waters in this state, the city or other municipality may apply through its legislative body to the commissioners appointed under the acts to which this is a further supplement for a grant or conveyance to such city or municipality of the lands under water in front of such public square or park; such grant to contain provisions that the same shall be kept and maintained as an open public square forever fronting on such tide-water; and that no buildings or other structures shall be erected on such square or park, or on the lands under water, which shall in any way obstruct or interrupt the view or public access to the water from any part of the said square or park; that said commissioners shall make said grant or conveyance, at a consideration of one dollar, upon receiving a written assent to such grant or conveyance of the person or corporation owning the title to the fee of the soil embraced within such public square or park; that such grant or conveyance shall contain the above provisions, and a copy of such assent, and shall also contain a provision that if at any time after the grant aforesaid such public square or park shall cease to be used as such, the lands under water granted as aforesaid shall at once revert to this state. (P. L. 1889, p. 322.)

[Inconsistent laws repealed.]

32. Use of riparian rights facing public park for business purposes.—Sec. 1. Any city or other municipality which shall have received, or may hereafter receive, from the riparian commissioners of the state of New Jersey, a grant of lands under water in front of any public square or park in such city or other municipality, under and by virtue of an act of the legislature of New Jersey

entitled "A further supplement to 'An act to ascertain the rights of the state and of riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this state,' approved April eleventh, one thousand eight hundred and sixty-four, and the several supplements thereto," and which said supplement was approved April nineteenth, eighteen hundred and eighty-nine, may, when in the judgment of the governing body of said city or other municipality it shall seem wise and for the best interests of said city or other municipality so to do, enter into a contract with the person or corporation owning the title to the fee of the soil embraced within such public square or park, or with any person or corporation to whom said owner of the fee of the soil thereof may have granted their rights in the said lands under water in front of said public square or park, upon such terms as may be agreed upon, whereby said lands under water in front of said square or park, or any part thereof, may be used by said owner of the fee, or person or corporation acquiring said rights of the owner of the fee for the purpose of docking, berthing, loading and unloading vessels, upon or over the said lands under water, from a dock adjacent to said lands under water for such period of time as in the judgment of such governing body may seem best for the interests of said city or other municipality; provided, that such contract shall contain a provision that no buildings or other structures shall be erected on the said lands under water in front of said public square or park which shall in any way obstruct or interrupt the view or public access to the water from any part of said square or park; and provided further, that a grant of said lands shall have first been made by the riparian commissioners of the state of New Jersey, with the privilege of using such waters for the purposes aforesaid. (P. L. 1901, p. 54.)

33. Use not to forfeit grant.—Sec. 2. The entering into and making of any such contract, and the use of said lands under water in accordance therewith, shall not be nor be construed to be a forfeiture of the grant of said

lands under water or any part thereof by said city or other municipality under said act. (P. L. 1901, p. 55.)

Preamble.—Whereas, there are islands situate in the tidal waters of this state, the lands below mean high water adjoining to which are the property of this state and are capable of being used for the erection and construction thereon of docks, wharves, piers, warehouses and other structures, which use will greatly promote foreign and inland commerce; and whereas, there are reefs and shoals in the tidal-waters of this state awash or submerged at mean high water which are the property of this state, which reefs and shoals and the lands below mean high water adjoining thereto which are also the property of this state, are also capable of such use as aforesaid, and foreign and inland commerce will be greatly promoted thereby; and whereas, it is just and wise that the state should so legislate as to permit its said lands to be used as aforesaid;

34. Riparian commissioners to establish exterior bulkhead and pier lines around islands in tidal-waters.—Sec. 1. That the riparian commissioners, or a majority of them, therein concurring, with the approval of the governor and after consultation with the board of engineers, acting under the authority of the secretary of war, and known as the harbor commission, shall, from time to time, fix and establish around or in front of all islands, reefs and shoals situate in the tidal-waters of this state, exterior lines in said waters, beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind shall be made or maintained, and also interior lines for solid filling in said waters, beyond which no permanent obstruction shall be made or maintained other than wharves and piers and erections thereon for commercial uses; provided, however, that no exterior line around or in front of any such island, reef or shoal shall be fixed and established in front of any riparian grant which has been heretofore made, unless such exterior line shall be fixed and established after consultation with the

said board of engineers at such distance as will, in the judgment of said commissioners, leave a sufficient waterway in front of said grants for navigation, and when the riparian commissioners shall have so fixed and established said lines after consultations aforesaid, they shall file a survey and map thereof in the office of the secretary of state, showing the lines for piers and lines for solid filling so fixed and established. (P. L. 1891, p. 15.)

35. Sale or lease of lands under water embraced within established lines.—*Sec. 2. That* the said riparian commissioners, or a majority of them, together with the governor, may sell or let to any applicant therefor any of the lands under water and below mean high-water mark, embraced within the lines so fixed and established, upon such terms as to purchase money or rental, and under such conditions and restrictions as to time and manner of payment, the duration and renewal of any lease, the occupation and use of the land sold or leased, and such other conditions and restrictions as the interest of the state may require, and as may be fixed and determined by the said riparian commissioners, or a majority of them, together with the governor. (P. L. 1891, p. 16.)

[Inconsistent laws repealed.]

36. Removal of deposits of sand, etc., from lands under tidal-waters without license; penalty.—Sec. 1. That no person or corporation shall dig, dredge or remove any deposits of sand or other material from the lands of the state lying under tidal-waters without a license so to do first obtained as provided in the second section of this act, and any person or corporation who shall so unlawfully dig, dredge or remove any deposit of sand or other material as aforesaid shall forfeit and pay for each and every such offense the sum of one hundred dollars, to be prosecuted for and recovered by an action on contract by any person or persons in any court of competent jurisdiction with costs of suit, the one-half the amount so recovered to be for the use of the state, and the other half to the use of

the person or persons who shall sue for and prosecute the same to effect; provided, however, that nothing in this section contained shall prevent the owner of any grant or lease from the state, or the assignee or lessee thereof, from digging, dredging, removing, and taking sand and other material within the lines of, or in front of, such grant or lease, for the purpose of improving lands granted or leased to them, or their grantors or lessors, by the state, nor prevent such owner, assignee or lessee from digging or dredging a channel or channels to the main channels, and removing and taking the material therefrom. (P. L. 1891, p. 213.)

37. License to dig, etc., deposits of sand under tidal-waters; moneys to be paid to state treasurer.—Sec. 2. That the riparian commissioners or a majority of them therein concurring with the approval of the governor, may, under such terms and restrictions as to duration, compensation to be paid, and such other conditions and restrictions as the interests of the state may require, license by an instrument in writing, executed in the same manner as grants of lands under water are required to be executed, any person, persons or corporations to dig, dredge or remove any deposits of sand or other material from the lands of the state under tidal-waters; and the moneys received from any such licenses as aforesaid shall be paid to the treasurer of the state for state purposes. (P. L. 1891, p. 214.)

38. Lease or grant of lands under water to persons other than riparian owners; notice.—Sec. 3. That the riparian commissioners, with the approval of the governor, may lease or grant the lands of the state below mean high-water mark and immediately adjoining the shore, to any applicant or applicants therefor other than the riparian or shore-owner or owners, provided the riparian or shore-owner or owners shall have received six months' previous notice of the intention to take said lease or grant such notice given by the applicant or applicants therefor, and the riparian or shore-owner or owners shall

otherwise, on any part of the land lying between the base of the vertical line of the Palisades and high-water mark on the Hudson river, for the purpose of preparing the ground for the construction of buildings, or for commercial purposes; and provided further, that this act shall not apply to or in any way affect any right of the state involved in any pending suit or suits, nor shall it, nor shall any of its provisions affect or impair any lease or leases, grant or grants already made by the riparian commissioners. (P. L. 1895, p. 89, as amended P. L. 1898, p. 439.)

41. Grants to municipalities of lands under tide water in front of public park or street; conditions.—Sec. 1. Whenever any public park has been or shall hereafter be laid out or provided for by ordinance of any city or other municipality, under the authority of any act of the legislature of this state, along or fronting upon any of the tide waters of this state, and whenever any streets or highways shall extend to said tide waters, such municipality may apply through its legislative body to the commissioners appointed under the act to which this is a further supplement, for a grant or conveyance to such city or municipality of the lands under water within the limits of said public park, and of the land in front of said streets or highways; such grant to contain a provision that any land under water granted or conveyed for park uses shall be kept and maintained as an open public park or place for public resort and recreation, and that no building or other structures shall be erected on such park or on the lands under water so granted and conveyed inconsistent with its use as a public park or place for public resort and recreation; provided, however, that public walks and drives may be constructed along or upon any portion of the land so granted or conveyed. (P. L. 1903, p. 387.)

42. Consideration of grants to municipalities; reversion.—Sec. 2. The commissioners may, upon the payment therefor of a consideration, the amount of which shall be fixed in the manner now provided by law for the fixing of the amount of the considerations to be paid for

grants of riparian lands by said commissioners, make all such grants or conveyances applied for as aforesaid for the lands under water owned by the state extending from the inland limits of such park to the exterior line established or to be hereafter established by the said commissioners, and for all land under water within the lines of the streets or highways, and in front of the ends of such streets or highways and extending from the high-water lines of said exterior line; and said grant or conveyance shall also contain a provision that if at any time after the grant or conveyance aforesaid has been made, such public park or highway shall cease to be used as such park or place for public resort and recreation, or as such street or highway, the lands under water, granted as aforesaid in front thereof, shall at once revert to the state. (P. L. 1903, p. 388.)

43. Conveyances to others than municipalities prohibited.—Sec. 3. No conveyance shall hereafter be made by the said commissioners, except to the municipality aforesaid, of any land under water within the limits of such park or within the lines or at the end of any such public street or highway or oceanward thereof. (P. L. 1903, p. 388.)

[Inconsistent laws repealed.]

44. List of riparian leases in arrears to be prepared; re-entry; notice; report of commissioners; new lease or grant.—Sec. 1. It shall be the duty of the state treasurer on or before the first Tuesday in January, in each year, to make out a list of all riparian leases held by the state on which rentals are in arrears and unpaid for the space of one year, and to transmit the same to the board of riparian commissioners, and in case any lease, the rentals of which are in arrears and unpaid, as aforesaid, shall contain a covenant or condition that upon nonpayment or failure to pay the yearly rent or sum reserved in said lease at the time or times fixed for the payment thereof it should be lawful for the state of New Jersey by

its officers or agents, to re-enter, and to have, possess and enjoy, after such re-entry, the lands described in said lease, then the riparian commissioners, or any one of them, are hereby authorized and empowered to enter upon the land described in said lease, and in the name and behalf of the state of New Jersey, to take possession thereof. Such entry shall be made by said riparian commissioners, or by one of them, by going on said land, and announcing in the presence of one or more witnesses, that all rights under said lease are forfeited to the state of New Jersey. Before such entry is made, however, the board of riparian commissioners shall give notice, by publication at least once in each week for six weeks, in one of the newspapers published in the county in which the land covered by said lease is located, or by serving a copy of said notice personally on the grantee, his heirs, executors, administrators, successors or assigns. The notice so to be published or served shall set forth the name of the person to whom said lease was granted, and, if known to the riparian commission, the name of the person or persons holding the same by devise, grant, assignment or otherwise, and shall particularly state that if the rentals in arrears and unpaid be not paid on or before the expiration of said six weeks, all rights under said lease shall determine, become null, void and of no effect and forfeited to the state of New Jersey. After such notice shall have been published or served as aforesaid, and entry shall have been made on the land described in said lease as herein directed the said board of riparian commissioners shall report to the state treasurer the fact of such publication, service and entry on said land, and in case the notice shall have been published, shall annex to said report a copy of such publication, and in case the notice shall be served personally, an affidavit by the person serving the same, proving the truth thereof. Upon the receipt of said report, it shall be the duty of the state treasurer to forthwith transmit to the board of riparian commissioners the original lease of the land on which entry shall have been

made, whereupon the board of riparian commissioners shall have power, in the manner now prescribed by law, to again lease or grant the said land as fully to all intents and purposes as if the said lease had never been made; provided, however, that all right or rights of action, at law or in equity, which had accrued to the state of New Jersey for the rentals in arrears and unpaid up to the expiration of the time fixed in said notice shall not abate, but the same shall remain of the same force and effect as if this act had not been passed. (P. L. 1906, p. 124.)

45. Responsibility of state treasurer as to leases; release.—Sec. 2. The state treasurer, upon returning to the riparian commissioners the lease of the land upon which entry had been made in the manner prescribed in the preceding section, shall be and hereby is released from all responsibility or obligation arising from said lease. (P. L. 1906, p. 125.)

46. Laying pipes under tidal waters; consent of governor and commissioners required.— Sec. 1. It shall be unlawful for any person or corporation to lay any pipe or pipes on any of the lands of the state lying under tidal waters without the consent or permission of the governor and the board of riparian commissioners of this state first had and obtained in writing; provided, that nothing in this act contained shall be construed to apply to lands under the waters of the Atlantic ocean. (P. L. 1910, p. 154.)

Joint Resolution relative to the riparian commission.

(P. L. 1870, p. 69. Rev. 1877, p. 987.)

47. Payments in discharge of leases; conveyance in fee simple.— Sec. 1. That the riparian commissioners may and shall, in all leases, as well those authorized by the eighth section as those authorized by the fourth section of the act of last year, relating to the subject of lands under water, covenant on behalf of the state that the state will at any time accept the capital sum of which the annual payment is the interest, at the rate of

seven per centum per annum, in lieu of all further annual payments, and make conveyance of the fee-simple and may convey or lease to any exterior line hereafter to be fixed; and such lease or conveyance under said eighth section and this resolution shall, in all respects, be as effectual to pass all the perquisites of wharfage and other like profits, tolls and charges, as conveyances and leases under the fourth section would be. (Rev. 1877, p. 987.)

48. Leases to which resolution applies.—Sec. 2. That this resolution shall take effect immediately, and operate upon leases and conveyances whether delivered or to be delivered. (Rev. 1877, p. 988.)

An Act relative to the riparian commission.

(P. L. 1871, p. 118. Rev. 1877, p. 988.)

Preamble.— Whereas, applications are frequently made to said commission for grants and leases of lands which were heretofore, but are not now, under tide-water, and it is desirable to quiet the possession of those who so apply, but doubts have arisen whether such cases are now provided for by law; and it has been found by experience that grants and leases containing the grants and covenants authorized by the fourth section of the act approved March thirty-first, one thousand eight hundred and Sixty-nine, entitled "Supplement to an act entitled 'An act to ascertain the rights of the state, and of riparian owners, in the lands lying under waters of the bay of New York, and elsewhere in the state,'" approved April eleventh, one thousand eight hundred and sixty-four, and the joint resolution of one thousand eight hundred and seventy, are more readily accepted, and are more satisfactory, than those which do not contain the same;

49. Covenants, clauses and conditions to be inserted in grants or leases of lands under water.— Sec. 1. That the said commissioners with the concurrence of the governor and attorney-general, in all cases of application for grants or leases of land now, or at the time of

the application, or at the time of the lease or grant, under tide-water; and in all cases of application for grants or leases of lands which are not now, or shall not at the time of the application, or at the time of the lease or grant be under tide-water, and in all cases of applications for leases or grants for all or any of such lands may, notwithstanding the first proviso in the fourth section of said supplement, or any other clause or matter in said supplement contained, grant or lease, or lease first with a covenant to grant, and grant afterwards, for such principal sum that the interest thereof at seven per centum will produce the rental, such lands, or any part thereof lying between what was, at any time heretofore, the original high-water line and the exterior lines established or to be established, and grant or lease in all cases in which, in their discretion, they shall think such grant or lease should be made, such rights, privileges and franchises as they are authorized to grant in cases coming directly within the said fourth section, and enter into the same covenant in the name of the state, in all cases of grants or leases where they deem such covenants proper, as are authorized in grants or leases under said fourth section and insert such other covenants, clauses and conditions in said grants or leases as they shall think proper to require from the grantee or lessee, or ought to be made by the state; provided, that nothing herein contained shall authorize grants or leases in front of a riparian owner to any other than such riparian owner, except upon the proceedings and conditions in said supplement provided; and provided also, that the applications for grants or leases, and the certificates of said commissioners, governor and attorney-general, may in the cases hereby provided for, vary from the provisions of the said supplement in such manner as to conform to this act, and any party who has already asked for or accepted a lease or conveyance may apply for and have the benefits of this act, notwithstanding such former application or former acceptance of a lease or conveyance. (Rev. 1877, p. 988.)

50. Salary of commissioners.—Sec. 2. That each commissioner shall receive ($1,500) fifteen hundred dollars per annum. (Rev. 1877, p. 988.)

An Act to re-organize the board of riparian commissioners of this state.

(P. L. 1894, p. 267.)

51. Board of riparian commissioners; members; appointment; term.—Sec. 1. That the board of riparian commissioners shall hereafter consist of the governor and four other commissioners, to be appointed by the governor by and with the advice and consent of the senate who shall hold their office for a term of five years and until their successors are qualified. (P. L. 1894, p. 267.)

52. Board to be non-partisan; vacancies.—Sec. 2. That not more than two of the appointees shall be members of the same political party, and in all subsequent appointments the same political status shall be maintained, and in case of a vacancy the appointment shall be for the unexpired term only. (P. L. 1894, p. 267.)

53. Terms of members of existing board ended.—Sec. 3. That the term of office of the members of the present board of riparian commissioners shall expire upon the passage of this act. (P. L, 1894, p. 267.)

54. Commissioners; compensation.—See. 4. That the compensation of the new commissioners and the powers and duties of the new board shall be the same as now provided by law. (P. L. 1894, p. 257.)

55. Repealer.—Sec. 5. That all acts or parts of acts by which any different number, term of office or mode of appointment of said commissioners is provided for, or which are in any way inconsistent with any of the provisions of this act be and the same are hereby repealed, and that this act shall take effect immediately. (P. L. 1894, p. 267.)

An Act to prohibit the riparian commissioners from granting any special oyster rights or privileges in Delaware bay.

(P. L. 1894, p. 809.)

56. Commissioners not to grant exclusive right to plant or take oysters in Delaware bay.—Sec. 1. That the riparian commissioners shall not have the right or power, in the name of the state or otherwise, by deed, grant, or lease, to give, grant or convey to any person or corporation the exclusive right or privilege to plant or take oysters from any part of Delaware bay. (P. L. 1894, p. 309.)

An Act to authorize the refunding of the consideration received by the state in certain cases where title to the lands lying under water conveyed by it or sought to be conveyed has wholly or partially failed, and to provide for reconveying such title to the state and releasing claims against it.

(P. L. 1898, p. 191.)

57. Claims of persons holding deeds from state for lands under water, conveyance of which has failed; appointment of commissioners; report; payment; reconveyance of rights to state.– Sec. 1. There shall be appointed by the governor of this state a commission to consist of three persons, who shall be citizens of this state, which commissioners shall have power, and it shall be their duty, to hear by petition or in any informal way, the claims of any person or persons, or their assigns, holding deeds to lands lying under water from the state of New Jersey, or under the authority of any law thereof, the conveyance of which deeds has failed and loss resulted thereform; and said commission shall also ascertain and determine what amount, if any, in their judgment, should be paid to such person or persons and make report thereon to the comptroller of this state, upon whose war-

rant to the treasurer of this state there shall be paid to such persons the amounts so ascertained and reported as aforesaid; provided, the same shall first be appropriated in the annual appropriation bill; and provided, the findings of said commission shall have first been approved by the governor, who may in his discretion, reverse, alter or change the same, or refer the same back to the commission for further ascertainment and report; and provided further, upon payment of the amount or amounts as aforesaid the state be released from any further claims, and the rights of such persons, if any, be reconveyed to the state. (P. L. 1898, p. 191.)

An Act to compel the determination of titles to riparian lands and lands under water in which the state claims an estate in remainder or reversion and to quiet the title to the same.

(P. L. 1907, p. 96.)

58. Determination of title to riparian lands or lands under water; suit in chancery; requisites of bill, etc.—See. 1. When a grant or conveyance in fee of riparian lands or lands under water, or both, has heretofore been made or shall hereafter be made by the state or by the riparian commission to any person or corporation who or which is in possession, or whose lessee or grantee is in possession, under a lease or an estate for years of the same lands, or any part thereof, which lease has not expired, or which estate for years has not terminated, and the state denies the validity of such grant or conveyance of the fee, and desires to contest it, the attorney-general is hereby authorized and empowered to bring and maintain a suit in chancery on behalf of the state to settle the title to said lands and to clear up all doubts concerning the same. The bill of complaint or information in such suit shall describe the lands with reasonable certainty; shall set forth that the state denies that the fee has passed by such grant or conveyance to the grantee; that it still resides in the state; and shall name the corporation, person

or persons who claim under said grant or conveyance in fee, and shall call upon such corporation, person or persons to set forth and specify its, his or their title, claim or encumbrance, and how and by what instrument or authority the same is derived or created. (P. L. 1907, p. 96.)

59. Statement of object of suit to be given with subpoena.—Sec. 2. With the subpoena in such suit there shall be issued a ticket to each defendant, describing the lands, stating the subject of the suit, and that if the defendant claims any title or interest to or encumbrance upon said lands, he is required to answer said bill, but not otherwise. (P. L. 1907, p. 96.)

60. Costs.—Sec. 3. No decree for costs shall be had in such suit against any defendant who suffers a decree pro confesso against him or who shall answer disclaiming all title to, interest in or encumbrance on said lands; but said court shall in such cases, without further proof, decree that such defendant or defendants have no estate or interest in or encumbrance on said lands, or any part thereof, by such grant or conveyance in fee; and any defendant who shall by answer duly verified by oath deny that he claims or ever has claimed or pretended to have any estate or interest in fee in or upon said lands, or any part thereof, shall be entitled to his costs in said suit. (P. L. 1907, p. 97.)

61. Answer of defendant; claim to be specified.—Sec. 4. If any defendant shall answer claiming any interest or estate in fee in said lands, or any part thereof, he shall in such answer specify and set forth the estate or interest so claimed, and if not claimed in whole of said lands, he shall specify and describe the part in or upon which the same is claimed, and shall set out the manner in which and the sources through which such title or interest is claimed to be held and derived. (P. L. 1907, p. 97.)

62. Issue at law to settle validity of claim.—Sec. 5. Upon application of either party, an issue at law shall

be directed to try the validity of such claim or to settle the facts or any specified portion of the facts upon which the same depends, and the court of chancery shall be bound by the result of such issue, but may, for sufficient reasons, order a new trial thereof according to the practice in such cases; and when such issue is not requested, or as to the facts for which the same is not requested, the court of chancery shall proceed to inquire into and determine such claims, interest or estate according to the course and practice of said court; and shall, upon the finding of such issue, or upon such inquiry and determination, finally settle and adjudge whether the said defendant has any estate, interest or right in said lands, or any part thereof, by virtue of said grant or conveyance in fee, and what such interest, estate or right is, and in and upon what part of said lands the same exists. (P. L. 1907, p. 97.)

63. Final decree to settle rights of parties; terms of decree.—Sec. 6. The final determination and decree in such suit shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit. It shall not be necessary for the attorney-general on behalf of the state to make or offer to make any tender or payment into court on or before the filing of the bill or information, but if the decree of the court shall be in favor of the state, the court shall determine and decree upon what equitable terms the said grant or conveyance in fee shall be set aside and declared void and of no effect. (P. L. 1907, p. 97.)